dministrative Law Judge Decisions

-01-84	U.S. Steel Mining Company	WEVA 83-124-R	1
-02-84	Gulf Mineral Resources Co.	CENT 81-271-M	1
-04-84	U.S. Steel Mining Company	PENN 83-131	1
-07-84	Louis Henderson v. Loring Quarries, Inc.	CENT 83-48-DM	1
-08-84	Eddie Higgs d/b/a Higgs Trucking Co.	KENT 83-196	1
-09-84	Pyro Mining Company	KENT 83-225	1
-10-84	Turner Brothers, Inc.	CENT 83-40	1
-10-84	MSHA/James Clarke v. TP Mining, Inc.	LAKE 83-97-D	1
-11-84	Mathies Coal Company	PENN 84-2	1
-11-84	Westmoreland Coal Company	WEVA 82-340-R	1
-11-84	Marjorie Zamora v. U.S. Fuel Company	WEST 83-48-D	1
-11-84	Kitt Energy Corporation	WEVA 84-92-R	1
-14-84	FMC Corporation	WEST 81-100-RM	1
-14-84	Lawrence Everett v. Industrial Garnet Extrac.	YORK 83-6-DM	1
-15-84	Lonnie Jones v. D & R Contractors	KENT 83-257-D(A)	1
-15-84	Pyro Mining Company	KENT 84-87-R	1
-16-84	Getz Coal Sales, Inc.	LAKE 83-82	1
-17-84	The Pittsburg & Midway Coal Mining Co.	CENT 83-65	1
-17-84	Pyro Mining Company	KENT 83-248	1
-22-84	Duval Corporation	CENT 80-312-M	1
-22-84	U.S. Steel Mining Company, Inc.	PENN 83-115	1
-22-84	U.S. Steel Mining Company, Inc.	PENN 83-151	1

etc.. (Judge Koutras, April 4, 1984)

Secretary of Labor, MSHA v. Belcher Mines, Inc., Docket No. SE 84-4-M. (Ju
Kennedy, April 26, 1984)

Badger Coal Company v. Secretary of Labor, MSHA, Docket Nos. WEVA 81-36-R,
(Judge Steffey, April 11, 1984)

Secretary of Labor on behalf of James Clarke v. T P Mining, Inc., Docket N
LAKE 83-97-D. (Judge Kennedy, May 10, 1984)

Review was Denied in the following cases during the month of May:

Monterey Coal Company v. Secretary of Labor, MSHA, Docket Nos. LAKE 84-19-
etc.. (Judge Broderick, April 13, 1984)

Secretary of Labor, MSHA v. Todilto Exploration & Development Corporation,
Docket Nos. CENT 79-91-RM, etc.. (Judge Vail, April 17, 1984)

COMMISSION DECISIONS

WASHINGTON, D.C. 20006

May 11, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 82-106
CARBON COUNTY COAL COMPANY	:	

ORDER

This civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), is before us on interlocutory review. Carbon County Coal Company seeks review of an order of a Commission administrative law judge denying Carbon County's motion for summary decision. For the reasons that follow, we vacate th judge's order and remand to the judge for reconsideration of Carbon County's motion.

This case arose out of a citation and withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA" on August 24 and September 3, 1981, respectively, alleging that Carbon County was operating a mine without an approved ventilation system and methane and dust control plan in violation of 30 C.F.R. § 75.316. Section 75.316, which mirrors the statutory standard contained in section 303(o) of the Mine Act, 30 U.S.C. § 863(o), provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form.... ... Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Carbon County operates the Carbon No. 1 Mine, an underground coal mine located in Hanna, Wyoming. MSHA had approved and Carbon County had

approve an "installed capacity" requirement and insisted that the auxiliary fans be provided with a volume of air greater than their "free discharge capacity." The previously approved ventilation plan dated August 25, 1980, required that the volume of air made available to the auxiliary fans exceed their "maximum rated capacity." There are indications in the record that MSHA officials may have believed that this term was equivalent to "free discharge capacity," while Carbon County, in its motion for summary decision, asserts that the term referred to "installed capacity." 1/

The Carbon No. 1 Mine is located in MSHA Coal Mine Safety and Health District 9, headquartered in Denver, Colorado. District 9 had published "guidelines" regarding the contents of ventilation system and methane and dust control plans. The District 9 guideline regarding the amount of air to be made available to auxiliary exhaust fans stated: "[T]he volume of intake air delivered to the fan prior to the fan being started shall be greater than the free discharge capacity of the fan." The District 9 guideline essentially restated MSHA's national guideline regarding the amount of air to be made available to exhaust fans. The national guideline stated in part: "[T]he volume of positive intake air current available ... shall be greater than the free discharge capacity of the fan." The legal effect of the District 9 guideline, and of MSHA's possible reliance upon it during the plan review process, are at issue in this case.

By August 1981, negotiations over the free discharge capacity requirement reached an impasse, and the parties were unable to agree on a plan requirement governing the amount of air to be made available to the auxiliary fans. In a letter dated August 21, 1981, MSHA revoked its approval of Carbon County's plan dated August 25, 1980, and stated that it would not approve Carbon County's plan unless the plan contained the free discharge capacity provision. After MSHA's revocation of approval of Carbon County's plan, Carbon County failed to submit a plan containing the provision sought by MSHA and continued to operate the mine. As a result, MSHA issued a citation and withdrawal order to Carbon County, under sections 104(a) and (b) of the Mine Act, respectively, for

1/ In essence, "installed capacity" refers to the ventilation capacity of an auxiliary fan when the fan is operated with tubing attached to it. "Free discharge capacity," on the other hand, refers to the ventilation capacity of an auxiliary fan when the fan is operated without tubing attached. The tubing extends from the fan to the face area. The fan

Carbon County initiated pretrial discovery. At the close of discovery, Carbon County advised the judge that it intended to move for summary decision under Commission Procedural Rule 64. 2/ In its motion and supporting brief Carbon County argued that MSHA had improperly required it to adopt the disputed provision in violation of the legal principles controlling the ventilation plan adoption and approval process enunciated in Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976).

In Zeigler, which arose under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977), the court construed section 303(o) of that Act. This provision was retained without change as section 303(o) of the 1977 Mine Act. The court held that provisions of a ventilation system and methane and dust control plan, approved by the Department of Interior's Mine Enforcement and Safety Administration ("MESA"), MSHA's administrative predecessor, and adopted by the operator were enforceable under the 1969 Coal Act as though they were mandatory standards. 536 F.2d at 402-09. As Carbon County noted, however, in discussing the ventilation plan approval process the court drew a distinction between a negotiated plan requirement "suitable to the conditions and the mining system of the coal mine" and a provision of a general nature, not based on the particular conditions at the mine, which the government sought to impose in the plan but which "should more properly have been formulated as a mandatory standard" in conformity with the rule making requirements of section 101 of the 1969 Coal Act. 536 F.2d at 407.

Carbon County contended that MSHA had insisted on inclusion of the general free discharge capacity guideline in its ventilation plan, mechanically, without regard to the particular conditions at the Carbon No. 1 Mine. Carbon County maintained that MSHA's free discharge capacity guideline was a general provision applicable to all mines, and that before MSHA could lawfully impose that requirement on an operator in the plan approval process the provision should first have been promulgated as a standard pursuant to the rule making requirements of section 101 of the Mine Act. Carbon County also argued that, regardless of the applicabi

2/ 29 C.F.R. § 2700.64 states in part:

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary decision disposing of all or part of the proceeding.

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions,

to Carbon County, MSHA invalidly insisted upon inclusion of the free discharge capacity requirement in Carbon County's ventilation plan.

In an unpublished order dated February 4, 1983, the Commission's administrative law judge denied Carbon County's motion for summary decision. The judge issued the order without providing the Secretary of Labor adequate opportunity to respond to Carbon County's motion. 3/ The judge did not address the issues raised by Carbon County. Rather, he viewed the question before him as simply requiring a decision as to which proposal for providing air to the auxiliary fans was safer. The judge stated:

> I have no doubt that MSHA can properly approve a ventilation plan and then at a later date, and for good reason withdraw that approval. The procedures for withdrawing that approval and the amount of time allowed in this case seem reasonable so the question is: was there a good reason for MSHA to insist that the ventilation plan include a [free discharge capacity] provision.
>
> * * *
>
> I am not concerned with the guidelines or who drafted them. I am concerned with what would happen if a break in the tubing occurred at various places where the available intake air does not exceed the ... free discharge capacity of the auxiliary fan. Until the parties provide me with that information, I will not be able to decide whether MSHA's demands would create a safer mine.

Ruling on Motion at 1-2.

We conclude that the judge's ruling was erroneous. Entry of summary decision is warranted when "the entire record ... shows: (1) that there is no issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.64(b). Carbon County presented to the judge those facts,

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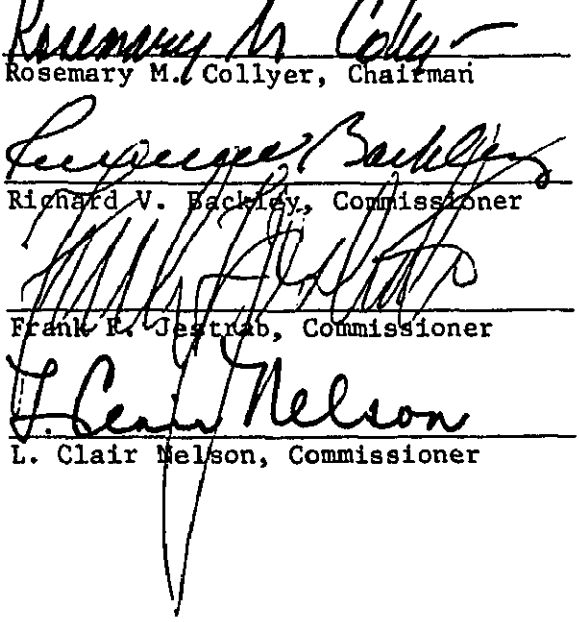
3/ The judge ruled before the 15 days permitted under our pro-

arguments, there were undisputed material facts in the record which entitled Carbon County to a decision in its favor. The judge's bare statement that, "I am not concerned with the guidelines or who drafted them," is, to say the least, ambiguous. Because the judge provided no explanation of this statement, we cannot regard it as a persuasive indication that he did consider, or rule on, the operator's legal challenges.

The court's exposition in Zeigler of the general legal principles controlling the ventilation plan approval and adoption process was premised on the same statutory standard presently applicable under the Mine Act. 30 U.S.C. § 863(o). We find the court's discussion persuasive and compelling, and hold that the general principles enunciated in Zeigler apply to the ventilation plan approval and adoption process under the Mine Act. See Zeigler, 536 F.2d at 407. Therefore, if MSHA's insistence in this case upon inclusion of the free discharge capacity provision in Carbon County's plan contravened the principles of Zeigler, the citation and withdrawal order issued to Carbon County cannot stand. As noted above, however, the judge did not rule on this question. We conclude that, in the interests of proper judicial administration, it is incumbent on the judge, as the trier of fact, to first consider and rule on Carbon County's arguments in its summary decision motion concerning the application of Zeigler to the facts at hand. Furthermore, before making his ruling, the judge shall afford the Secretary of Labor the opportunity to respond fully to Carbon County's motion. 4/

4/ We note that counsel for the Secretary of Labor has argued on interlocutory review that the free discharge capacity provision is merely an MSHA "policy statement" or "interpretation" of the mandatory standard prohibiting recirculation of air, 30 C.F.R. § 75.302-4(a), and that as such it does not run afoul of Zeigler, the Mine Act, or the APA. Counsel for the Secretary also has argued that the ventilation system proposed by Carbon County was rejected not because of MSHA's inflexible



Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

The legal issue presented by Carbon County is one of first impression
fore the Commission. It is improper at this stage of the proceedings
r this Commission to determine in the abstract, without the benefit of
complete record, whether the general principles discussed in Zeigler,
pra, unnecessary to that holding and therefore dicta, should be adopted
this Commission. Furthermore, I note that this case appears to raise
sues that the Zeigler court specifically declined to discuss, 536 F.2d
410 n. 57, as well as factual and legal matters which distinguish it
om the general principles there discussed. 1/ Under these circumstances,
e majority's holding in this Order may be dicta as well.

Accordingly, I concur in the remand but intimate no view at this time
to whether Zeigler is "persuasive and compelling" (slip op. at 5) or
en apposite to this case.

A. E. Lawson, Commissioner

The Secretary has maintained on interlocutory review that the guideline
no more than a general statement of MSHA policy on approval of ventila-
on plans, and is to be distinguished from a legislative rule. In his view,
e ventilation system proposed by Carbon County was rejected not because
any guideline, but because the Secretary did not believe it provided a
fe ventilation system at the particular mine in question. The Secretary
rther asserts, with reference to specific deposition testimony, that the
ideline does not bind the district manager, who is responsible for the
proval or rejection of plans, and that the district manager's insistence
on "free discharge capacity" ventilation was required by conditions at this
rticular mine: the size and length of the tubing, the capacities of the
in and auxiliary fans at the mine, previous history of air recirculation
oblems at this mine, and/or the previous history of violations resulting
om a failure to maintain the ventilation system. In short, the Secretary
of the view that MSHA did not approve Carbon County's revised plan because
HA's district manager had reasonable grounds to believe that Carbon County's
oposed plan language would not meet the requirements of section 303(o) of
e Act and the validly promulgated mandatory standards contained in Subpart D
30 C.F.R. Part 75, and that an evidentiary hearing is required to resolve

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ADMINISTRATION (MSHA)	:	KENT 83-182-R
	:	KENT 83-183-R
v.	:	KENT 83-184-R
	:	KENT 83-256
PONTIKI COAL CORPORATION	:	KENT 83-262

ORDER

The administrative law judge's motion for leave to intervene and his motion for a remand are denied as unauthorized. Canterbury Coal Co., 1 FMSHRC 335 (1979); Cf. Peabody Coal Co., 2 FMSHRC 1035 (1980); Penn Allegh Coal Co., Docket No. PITT 79-97-P (Order, January 3, 1979). Accordingly, the following documents are struck from the record in this proceeding: (1) the judge's motion to intervene and the accompanying opposition to the Secretary's petition for discretionary review; (2) the Secretary's opposition to motion for leave to intervene; (3) the judge's response to the Secretary's opposition; (4) the judge's motion to remand; (5) the Secretary's opposition to motion to remand; and (6) the judge's response to the Secretary's opposition.

Also, the affidavit and memorandum attached to the Secretary's petit for discretionary review are struck as not being part of the record befor the judge. 30 U.S.C. § 823(d)(2)(C).

In view of the serious allegations contained in the judge's submissi the Commission has, by letter dated May 18, 1984, brought the information contained in the documents struck from this record to the attention of th Attorney General of the United States for such action as is appropriate.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

v. : Docket No. WEST 82-174
:
MID-CONTINENT RESOURCES, INC. :

DECISION

The issue presented in this civil penalty case is whether substanti evidence supports the conclusion of the Commission's administrative law judge that Mid-Continent Resources, Inc., violated 30 C.F.R. § 75.511, a mandatory safety standard requiring that certain electrical work be performed by qualified persons. For the reasons that follow, we conclu that substantial evidence supports the judge's decision and we affirm.

The case arose following a methane and coal dust explosion at the Dutch Creek No. 1 Mine on April 15, 1981. The mine is owned and operat by Mid-Continent and is located in Pitkin County, Colorado. Fifteen miners were killed in the accident and three received non-fatal injuries

The Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the explosion. In its accident investigation repo (Pet. Exh. 1), MSHA concluded that the methane was ignited by an electri arc originating inside an electrical switch box on a continuous mining machine. The machine was fitted with two lighting systems: one provide by the manufacturer and an additional system installed by the company, known as "add-on lights." When the mining machine was examined after th accident, it was discovered that the switch box for the add-on lights had an opening between the box and the box cover (the switch box "cover plate") which exceeded permissible limits. (The opening was in excess of .015 inch. The maximum clearance permitted under the applicable mandatory standard is .004 inch.) The oversized opening was the result of an insulated wire having been wedged in the flange joint between the switch box and the cover plate.

MSHA concluded that prior to the explosion there had been a sudden release of methane. MSHA determined that following this release, mining was discontinued on the section and the section crew began making venti- lation changes in the face area to dilute and carry away the methane. When the concentration of methane in the atmosphere around the continuou miner reached 2.0 volume per centum, power to the miner was automatical

Because MSHA believed that the non-permissible opening between the switch box and the cover plate was part of the causative chain leading to the explosion, MSHA attempted to determine who had installed the cover plate. MSHA concluded that the cover plate was installed on April 6, 198 nine days before the explosion and that this work was not performed by a qualified person or performed under the direction of such a person as required by 30 C.F.R. § 75.511. MSHA therefore issued a citation to Mid-Continent which alleged a violation of section 75.511. The pertinent provision of this standard states:

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person.

A civil penalty proceeding ensued. Following an evidentiary hearing, the judge entered a decision in which he affirmed the violation and assessed penalty of $10,000. 5 FMSHRC 261, 273-78 (February 1983)(ALJ). 2/

The judge found that the cover plate was installed by Marge Theil, a miner who was not a qualified person within the meaning of section 75.511 At the hearing, the Secretary of Labor introduced evidence showing that

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1/ The continuous miner was equipped with a methane monitor. 30 C.F.R. § 75.313, a mandatory safety standard requires that the methane monitor be set to deenergize the machine automatically when there is more than 2.0 volume per centum of methane in the mine atmosphere. However, in this instance, the methane monitor was not wired into the primary circuit of the continuous miner's lighting transformer. As a result, when the sensor of the methane monitor detected concentrations of methane exceeding 2.0 volume per centum it deenergized the continuous miner, but not the add-on lights which remained lit. MSHA therefore cited Mid-Continent for a violation of section 75.313, and the judge concluded the company violated the section by failing to properly wire the methane monitor. 5 FMSHRC at 269-71. Mid-Continent did not seek review of this portion of the decision.

2/ In addition to asserting that the cover plate was not installed by a qualified person, the citation also alleged that the light switch was not wired by a qualified person. Because MSHA offered no evidence to prove that alleged violation, the judge vacated that portion of the citat

3/ Cecil Lester is a coal mine inspector stationed at MSHA headquartere Arlington, Virginia. His specialty is the investigation of mine fires ar mine explosions which are suspected of having an electrical cause. The f lowing exchange at the hearing took place between Lester and the Secretar counsel:

> Q. Mr. Lester, did you participate in determining whether a qualified person had installed the light switch cover on the auxiliary light control?
>
> A. Yes.
>
> Q. And what did you learn as a result of that investigation?
>
> A. Of course, no one was there that we knew of when the light switch cover was installed, therefore, we had to rely upon statements made by company officials. We questioned each foreman, trying to find out who installed it, and we determined by the process of elimination, and also by Mr. Meraz' statement that it was installed on the third shift. [Meraz was the master mechanic in charge of equipment maintenance at the mine. All maintenance foremen reported to him.] We talked to the maintenance foreman on the third shift, Mr. John Cerise, and he told us that it probably was installed by a Mrs. Marge Theil, who was not a qualified person. ... We talked to Marge Theil and she stated that she didn't remember whether she put the light switch cover on or not.

Tr. 389-90.

4/ Clarence Daniels is also an MSHA coal mine inspector specializing in electrical inspections. His task during MSHA's investigation of the explosion at the Dutch Creek No. 1 Mine was to examine the entire electrical system of the mine. He testified as follows:

> Q. What did these two gentlemen [Cerise and Meraz] tell you?
>
> A. They told me they thought this lid was put on this particular machine on April the 6th, 1981. John Cerise stated that he examined this lid on April 6th and found out if the light switch worked. He said he did not examine the box as far as permissibility. When asked who put the lid on, Mr. Cerise stated that he didn't know who put the

mber of qualified persons at the mine and that it was the operator's stom and practice to have only certified personnel perform those tasks ich required special qualifications. However, in the judge's opinion, is evidence did not overcome the admission of the foreman, Cerise, to e inspectors concerning Marge Theil. The judge observed that neither rise nor Theil said anything to the inspectors concerning this custom d practice. 5 FMSHRC at 277. The judge noted that the only statement tributed to Theil on the subject was that she "couldn't remember whether e put the lid on or not." Id. 5/

The judge concluded that the evidence supported a finding that the ver plate was not installed by a qualified person as required by the ted standard, and found the operator to have violated 30 C.F.R. § 75.511. granted Mid-Continent's petition for discretionary review and subsequently ard oral argument in the case.

The essence of Mid-Continent's challenge on review is that the judge's ading of a violation is not supported by substantial evidence. Mid-Continen gues that the judge, in relying upon Lester's and Daniels' recitations of at they were told by Foreman Cerise, based his finding of a violation upon corroborated hearsay speculations rather than upon statements of fact. d-Continent also contends that even if the violation could be established the statements of Cerise, as recounted by the inspectors, it successfully fended by establishing that the Secretary failed to prove that all the alified persons who could have installed the cover plate did not do so.

We begin by noting that the judge properly admitted and relied upon the stimony of Inspectors Lester and Daniels concerning what they were told by reman Cerise. Hearsay evidence is admissible in our proceedings so long as is material and relevant. Secretary of Labor v. Kenny Richardson, 3 FMSHRC 12 n.7, aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, __ U.S. ___, L. Ed. 2d 299 (1983). In this instance, the hearing testimony was offered prove that the cover plate was not installed by a qualified person. Becaus e installation was at issue in the case, the testimony was material. The arsay testimony was relevant also in that, if true, it tended to prove this pposition.

Moreover, properly admitted hearsay testimony, and reasonable inferences awn from it, may constitute substantial evidence upholding a judge's decisio

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Theil was not called as a witness by either party and did not appear at

reject a per se rule that evidence may not be considered to be substantial for purposes of our review merely because it bears a hearsay label. Rather we look to its underlying probative value to determine if the evidence may support a judge's finding of fact.

Although no single test can be established to evaluate the role of hearsay in determining whether substantial evidence supports a judge's finding, we measure the probative value of such evidence by weighing it against various factors, which, when added together, may tip the scale for or against a determination that substantial evidence is present. For example, we look to whether the out-of-court declarant, whose statemen is reported at the hearing by another, had an interest in the outcome of the case and thus a reason to dissemble. Richardson v. Perales, 402 U.S. at 402-03. We also examine whether the out-of-court statement rests on personal knowledge gained from firsthand experience. 402 U.S. at 403. If there is more than one reported statement, we inquire whether the statements are consistent. 402 U.S. at 404. We also find significant whether the party against whom the statement was used exercise the right of subpoena so as to cross-examine the out-of-court declarant.

6/ Counsel for the Secretary of Labor contends that Cerise's statements are "admissions by a party opponent" under Rule 801(d)(2) of the Federal Rules of Evidence. As such, counsel asserts that the statements are presumed to be reliable and trustworthy and are entitled to considerable weight as statements which are not hearsay. This argument may possibly confuse the presumed reliability of a party opponent's admissions with the reliability of an unavailable declarant's statements against interest. See Fed. R. Evid. 804(b)(3); 4 J. Weinstein & M. Berger, Weinstein's Evidence 801-134 to -139 (1981). Even were we to regard Cerise's statements as "admissions by a party opponent" we still would be required to examine their underlying probative value. However, we decline the opportunity to become enmeshed in the hearsay intricacies and terminology of the Federal Rules of Evidence. While the Federal Rules of Evidence may have value by analogy, they are not required to be applied to our hearings either by their own terms, by the Mine Act, or by our procedural rules. By contrast, the National Labor Relations Board is required under its organic act, the National Labor Relations Act, 29 U.S.C. § 151 et seq., to conduct its administrative hearings "so far as practicable" in accordance with the Federal Rules of Evidence. 29 U.S.C. § 160(b). See NLRB v. Process and Pollution Control Co., 588 F.2d 786, 791 (10th Cir. 1978). We believe it better to view hearsay statements as possibly relevant and material evidence whose probative value must be evaluated on the basis

John Cerise was the out-of-court declarant whose statements were testified to by the MSHA inspectors. Cerise, foreman of Theil's shift, would have had good reason not to state that the electrical work was done on his shift by an unqualified person. As the foreman of the maintenance shift, it was his job to assign the maintenance tasks which needed to be done, including the installation of the switch box cover plate. (Cerise directed repair work on mining equipment. Tr. 276, 378). Also, as forema he was responsible for assuring the work was done in compliance with applicable safety standards. Cerise's statements would tend to indicate that he may not have met his responsibilities in this regard. In addition Cerise's statements rested upon his personal knowledge and first-hand experience. He was on the section on April 6, the day he stated that Thei probably installed the plate. In addition, as noted above, installation o the cover plate was the type of work which would be performed by his crew. As the foreman, he may be presumed to know what his miners were doing.

We note also that the testimonial accounts of the two MSHA inspectors concerning their conversation with Cerise refer to the same series of events and are consistent.

Nor did Mid-Continent produce witnesses who testified that Cerise's statements were not made or that the content of the statements was reporte inaccurately. Both inspectors agreed that Theil stated that she could not remember whether or not she installed the cover plate. Mid-Continent had no records pertaining to the installation of the cover plate. Oral Arg. Tr. 10. Mid-Continent's vice president stated that the company did not kn who installed the plate. Tr. 289. Further, Cerise, a salaried employee of Mid-Continent, was not subpoenaed by the operator to rebut what he was reported to have said to the inspectors. 7/

7/ Our dissenting colleagues err in their assertion that Mid-Continent was effectively denied by Commission Rule 59 the right to discover, prior to hearing, the identity of declarants Cerise and Theil (Slip op. at 5). The Secretary's MSHA accident investigation report (Exhibit 1) was referre to by Mid-Continent in its answer to the citation issued herein. The reco notes that Cerise stated that the cover plate was installed on April 16, 1981, and this operator could certainly have interviewed Cerise and determined what he had told MSHA, including his identification of Theil as the miner who installed the cover. Further, it is unclear what effect, if any Rule 59 would have had on Mid-Continent's ability to obtain the identity o an informant whose identity had already been disclosed in the report. Alt Counsel for Mid-Continent stated at oral argument that he first learned at

that a violation would not normally have occurred does not outweigh the inference drawn from specific testimony that the violation did occur.

In evaluating the probative value of Cerise's statements to the inspectors, we recognize that his statements, to some degree, were expressed in terms of probability rather than in terms of absolute certainty. Howev the record clearly supports a finding that the cover plate was installed c Cerise's maintenance shift, the "C" shift, on April 6 by a member of Cerise's crew. Inspectors Daniels and Lester stated that they were told s by Cerise and by John Meraz, Mid-Continent's master mechanic whose job it was to supervise the foremen. Tr. 57, 71, 378, 389, 403. 8/ Presumably, therefore, Cerise knew whereof he spoke when he indicated his belief that Theil had probably installed the cover plate. The judge inferred from thi testimony that it was more probable than not that Theil had, in fact, installed the plate. 9/ Such inferences are permissible provided they are inherently reasonable and there is a logical and rational connection betwe the evidentiary facts and the ultimate fact inferred. See, for example, EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 194 (3rd Cir. 1980).

Moreover, as noted above, the substantial evidence standard may be m by reasonable inferences drawn from indirect evidence. See, for example, FMC v. Svenska America Linien, 390 U.S. 238, 248-49 (1968); U.S. v. FMC, 655 F.2d at 253-54. This is particularly true where, as here, it is eithe impossible or there is only a remote possibility of obtaining direct evidence to establish a violation. We must be mindful of the fact that the Secretary alleged a violation that was associated with a fatal explosion. It is not surprising under the circumstances that no person would admit installing the cover plate and that direct proof was lacking. Given the difficulty of obtaining direct evidence as to who installed the plate, we find the judge's inference that Theil installed it to be reasonable, inherently probable and logically connected to the evidentiary facts at hand. Moreover, as the Supreme Court has emphasized, "The possibility of drawing either of the two inconsistent inferences from the evidence [does] not prevent [an agency] from drawing one of them...." NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106 (1942).

8/ In addition, the "B" shift maintenance foreman informed inspector Daniels that the lid was not installed on the "B" shift. Carl Heater, the only qualified person on the "A" shift told the inspector he had no knowledge of it being instlied during the "A" shift. We also note that at oral argument Mid-Continent's counsel conceded that the cover plate was installed on April 6. Tr. Arg. 10.

9/ Theil did not advise the MSHA investigators that she had never

Accordingly, on the bases explained above, the judge's decision is affirmed.

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

10/ The Secretary argues to us, as he argued to the judge, that he deductively proved the violation by establishing that all qualified personnel who could have installed the cover plate denied that they had done so. Mid-Continent disputes this claim. The judge did not rule on the merits of this contention, and in view of our disposition of the case we need not do so either. Nevertheless, we note in passing that Mid-Continent's contention in this regard centers on two named individuals, John Ball and Bernie Fenton. Although the statement of qualified electrician John Ball to the MSHA inspectors is to some degree uncertain, its thrust is a denial that he installed the cover plate, just as the thrust of Cerise's statement is an assertion that Theil had installed it. Ball is quoted by the inspectors as saying that he could not remember installing the cover plate, but that if he had installed it he would have checked between the plate and the switch box for impermissible openings. Tr. 58, 389-90.

We also note that Mid-Continent asserts that Bernie Fenton, a preventive maintenance engineer and a qualified person, was not interviewed by MSHA. Oral Arg. Tr. 13, 37. Without passing on the merits of this argument, we note that although Fenton usually worked on the "C" shift, it is not clear that his duties, unlike those of Cerise, would have included installation of the cover plate. His job was variously described as inspecting, oiling and greasing mine machinery and changing worn-out machine parts. Tr. 276, 358.

This case was best summed up by the trial attorney for the Secretary o Labor at the beginning of the hearing where he stated:

> The person or identity of the person who installed the light switch cover is not known, either by MSHA or Mid-Continent Resources. The light switch cover was most likely installed by the maintenance shift, which would be a third shift at this mine, but that fact has not been ascertained as a certainty. (Tr. 6).

After careful analysis of the entire record we find no reason to dispu the Secretary's counsel. Accordingly, we find that the Secretary failed to his burden of proving that the subject violation occurred and we would reve the ALJ and vacate the subject citation.

We wish to stress at the outset that this case does not present the qu of whether the cover plate was impermissible but only the question of who i it.

The Secretary stated that he did not know who installed the subject co plate, but that through a deductive process he could prove that Marge Theil unqualified miner, was the only miner who could have installed the cover pl His deduction, however, rests on uncorroborated hearsay testimony which, as shown herein, is itself weak and inconclusive. In order to establish any v inference made through a deductive process, it is integral to that process no other choice or possibility reasonably exist. NLRB v. Melrose Processin 351 F.2d 693 (8th Cir. 1965). Indeed, even the Secretary appears to have a this point when he argued in opposition to Mid-Continent's motion to dismis

> The testimony will show that in discussions with all the qualified personnel at the mine who may have had the opportunity to install that light switch box, all indicated they did not install it. Therefore, the only person who could have installed it would have been someone who was not qualified to install it. (Tr. 8; emph. added).

If the Secretary had actually conducted his investigation as indicated above, and if the Secretary had actually proved that all responses from all qualified personnel indicated that they had not installed the cover plate, might have been persuaded to affirm the ALJ. However, the record evidence clearly establishes that all qualified miners were not interviewed by MSHA, so claimed, and of those qualified miners interviewed, all did not clearly involvement with the installation of the subject

emen was ever called to testify at hearing. Moreover, in closely scrutini
testimony of Inspectors Daniels (Tr. 58-60) and Lester (Tr. 389), it is
arent that they did not question all miners who were legally qualified to
tall the subject cover plate, but rather relied upon the qualified represe
ions made by the aforenamed miners.

The record also clearly establishes that the Secretary, in issuing the
ject citation and in prosecuting this matter, did not consider or intervie
qualified personnel working on the preventive maintenance crew which oper
the "C" shift, the very shift during which the Secretary asserts the subje
er plate was installed. (Tr. 170). This unbelievable omission was appare
ontinuing one because the Secretary professed ignorance of the existence o
special maintenance crew at oral argument. (Oral argument Tr. 25). This
ssion of evidence as to an entire crew significantly undermines the Secret
uctive process. Indeed, the respondent's evidence suggests that the job o
lacing the cover plate could have been routinely performed by the preventi
ntenance crew or by one of the production crews.

We also find it significant that the "B" shift had been idled for five d
ceding the April 15 explosion and that no coal production occurred during
t time. During such "down time" mechanical and/or electrical work is cus-
arily performed on the equipment. Inspector Daniels admitted that he did
w production had been suspended. (Tr. 76, 77). Additionally, Master Mech
az testified that a "foul up" involving qualifed miner Ball had made it
essary for "B" shift mechanics Darrell Clark and Eugene Gutherie to perfor
missibility checks ordinarily performed on the "C" shift. This testimony
icates that prior to the explosion, production shift personnel did perform
k ordinarily performed on the "C" shift. This fact is ignored by the majo
the reason that it further removes support for their conclusion.

Clearly the line between production shift work assignments and maintenan
ft work assignments often became blurred and therefore it is unreliable an
easonable to hinge a conclusion of violation on a contrary presumption.
sequently, because the Secretary has not identified all of the qualified
ers who were actually working on April 6, 1981, we can only wonder who els
not interviewed 2/.

Although not established by the Secretary, Mid-Continent appears to have
ceded this point. (Oral argument Tr. 10).

Obviously, it was not possible to interview deceased qualified miner Eugen

Tr. 58); and "He stated that if he had installed it, he would have checked it with a feeler gauge." (Lester, Tr. 390).

The majority noted the foregoing and concluded that the statement of Ball was "uncertain" but "its thrust is a denial that he installed the cover plate. Although we find the declarations attributed to John Ball to be weak, equivoca and insubstantial, not unlike the declarations attributed to John Cerise and Marge Theil, it is of greater interest to note the sharp inconsistency with which the majority evaluated the subject hearsay evidence. Inspector Daniels also testified that Marge Theil said "she couldn't remember whether she put th lid on or not." "Couldn't remember" results in the exculpation of John Ball, but through unexplained logic, is used to incriminate Marge Theil!

Beyond the foregoing hearsay testimony characterizing Marge Theil's stat the Secretary's case rests upon the hearsay testimony of the two MSHA inspect purporting to relate the declarations of John Cerise, Mid-Continent's mainten foreman of the "C" shift.

Initially it should be noted that the record fails to clearly indicate t manner in which MSHA Inspectors Daniels and Lester conducted their interview(of declarants Cerise and Theil. Specifically, it is unclear whether the insp conducted all interviews jointly or separately. This is not insignificant. number of times and circumstances under which witnesses are interviewed is material in evaluating the reliability and trustworthiness of the declaration This factor is even more critical when the entire issue of liability may be hinged upon such "evidence."

As noted in the majority decision, Inspector Daniels testified that John Cerise said, "He didn't know who put the box on. That he thought Marge Theil his shift had put the light on." (Tr. 57). Inspector Lester testified, "He told us that it probably was installed by a Mrs. Marge Theil." (Tr. 389).

If the foregoing testimony resulted from one interview then there is no explanation why the stronger inference of "probability" should have been adop by the administrative law judge and the majority.

Beyond the fact that the attributed statement(s) itself is weak and inco clusive, more damaging is the fact that it stands alone without any corrobora Although the record contains MSHA reference to a "notetaker", no written cor- roboration is found in the record. Indeed, even the most rudimentary attempt corroborate the hearsay is not to be found in the record, i.e., there is no evidence showing that Marge Theil actually worked on April 6, 1981. Accordi

The majority's reliance upon Hayes v. Department of the Navy, 727 F.2d 153
ed. Cir. 1984), is similarly flawed. Hayes involved the hearsay use of agenc
cords in a hearing before the Merit Systems Protection Board on an appeal of
Hayes' discharge. The record at issue detailed the circumstances of the
ployee's conviction for assault and battery on a 10-year-old female child.
e record was developed by a Navy Captain, who had "prepared a memorandum for
e record which reflected in detail his conversation with Mr. Hayes, his
torney, and with the prosecuting attorney..." 727 F.2d at 1536. It is note-
rthy that this record was a contemporaneous one, on an issue the employee did
dispute. The employee had been advised, before the hearing, of his right t
e and copy any part of the record developed by the Navy and had not done so.
accepting the hearsay, the court also relied on the fact that it was submitt
required by properly promulgated regulations of the MSPB. 727 F.2d at 1538-

Surely the hearsay evidence at bar, i.e., the testimony of two MSHA inspec
ich completely lacks detail or any form of corroboration, is in no way analog
the Hayes memorandum detailing the circumstances of a criminal conviction,
ich conviction was admitted by the employee.

Despite the inherent weakness of the Secretary's case, the majority has
ncluded, relying upon Richardson v. Perales, 402 U.S. 389 (1971), that hearsa
idence may constitute substantial evidence, and that in the instant case the
bject hearsay evidence is substantial evidence.

Although we do agree that under certain circumstances hearsay evidence may
nstitute substantial evidence, we find the majority's reliance upon Perales t
erroneous. The quality, quantity and precision of the hearsay evidence
viewed by the Court in Perales was far superior to the instant hearsay eviden

In Perales, the Supreme Court held that written medical reports prepared b
censed physicians who had independently examined a disability claimant could
received as evidence despite their hearsay character and could constitute
bstantial evidence supportive of a finding adverse to the claimant when the
aimant had not exercised his right to subpoena the reporting physicians and
ereby avail himself of the opportunity to cross-examine them. In reaching it
cision, the Court carefully outlined several factors pertinent to the written
ports which the Court felt would "assure underlying reliability and probative
lue." 402 U.S. at 402.

The Court noted that the social security administrative agency sponsoring
e hearsay evidence operated as an adjudicator and not as an advocate. Certai

em as an exception to the hearsay rule." 402 U.S. at 407. The Court furth
dicated that there exists a uniform court recognition of "reliability and
obative value" in written medical reports. 402 U.S. at 405.

Our review of the subject hearsay evidence discloses the existence of no
the above-noted safeguards. MSHA's evidence is extremely narrow and incon
consists totally of unclarified hearsay without any indications of the cir
ances under which statements were obtained, without contemporaneous corrobo
tes, and without certainty within the declarations themselves. The haphaza
vestigation which overlooked a number of qualified persons who might have
stalled the cover plate was by no means a "careful endeavor." The Secretar
ilure to call Marge Theil and/or John Cerise is similarly lacking in care.
is house of cards is not by any measure "impressive."

The Court in Perales was also influenced by the fact that the claimant
iled to seek issuance of the subpoena for the presence of the reporting phy
twithstanding notification that the medical reports were on file and were
vailable for claimant inspection prior to hearing.

In the instant case Commission Procedural Rule 59, 29 CFR Section 2700.
fectively denied Mid-Continent the right to discover, prior to hearing, the
dentity of declarants John Cerise and Marge Theil 4/. Therefore Mid-Contine
nnot properly be faulted for failure to seek a subpoena prior to hearing.
n this failure be utilized as it is by the majority, to give support to the
ndings. Moreover, in view of the weak and insubstantial evidence introduce
the Secretary, the party with the burden of proof, we have no difficulty i
derstanding why Mid-Continent apparently decided not to seek the issuance o
bpoenas commanding the presence of declarants Cerise and Theil.

Lost in all the pirouetting is the basic proposition that the government
s the burden of proof. Accordingly, its failure to adequately explain why
d not even attempt to subpoena the declarants who were apparently still liv

4/ Although the name John Cerise, along with numerous other Mid-Continent
ployees, appears in the MSHA investigative report, there was no prior indic
at Mr. Cerise knew, or disclosed to MSHA the name of Marge Theil, as the on
o "probably" installed the cover plate. Moreover, to recommend, as the maj
es, that Mid-Continent should have attempted to "determine what he (Cerise)
d told MSHA" (Slip op. at 6; emph. added) reflects a potentially serious
sensitivity to the parameters of the protections afforded miners under Sect
5 (c), which prohibits interference with miners in the exercise of their

It appears that the government was intentionally selective in its pres
insofar as particular witnesses were concerned. At oral argument, Counsel
MSHA admitted that Mrs. Theil was not called by MSHA because:

> ...she would have been an extremely uncooperative witness. At best she would not have recalled what happened. At worst we may have ended up having to ask the judge to declare her a hostile witness. We had very little in the way of knowing exactly what she would testify to. (Oral argument at 30, 31).

Therefore, the government spared the ALJ from the rigors of determining whe
the truth may lie, and instead presented a neat, tidy statement purporting
Marge Theil's position on this crucial issue. Accordingly, the question ar
as to whether the judge was given the complete picture. Since he was not,
credibility findings are suspect.

Finally, it should be noted that the Perales Court was in part motivat
conclude that the written medical reports should be accepted as substantial
evidence because of the extremely large volume of disability claim hearings
conducted. The Court indicated that amount to be in excess of 20,000 cases
year. Obviously, the administrative burden placed upon MSHA as well as thi
Commission in no way approaches that volume.

We conclude that many of the well-reasoned factors relied upon by the
Perales Court to insure the "reliability and probative value" of the hearsa
evidence are not to be found in the hearsay evidence at bar. We find the h
to be weak, equivocal, uncorroborated and therefore suspect. As such it is
"neither logical nor reasonable" to rely on such evidence as substantial ev
See Union Carbide v. NLRB 714 F.2d 657.

We are troubled by other serious lapses and contradictions in this pro
The ALJ found that Mid-Continent had provided "extensive evidence" supporti
its defense that an adequate number of qualified maintenance personnel were
employed at the mine and that Mid-Continent's evidence did establish that t
custom and practice at the Dutch Creek No. 1 mine was to have "only certifi
personnel perform occupational tasks which require special qualifications."
6 FMSHRC at 277. However, the ALJ rejected the defense of custom and pract
In support of that rejection, the ALJ found that declarants Cerise and Thei
both failed to state to MSHA anything about custom and practice at the mine
6 FMSHRC at 277.

We do not agree with the reasoning of the ALJ and the majority, and wo

anner of investigation, no indication of precisely what questions were aske
nd no indication of precisely what responses were provided. Here the enfor
gency characterized prior statements without any indication of the breadth
epth of the responses of either declarant. The record consists only of inc
ecollections of two MSHA inspectors who may have heard one declaration from
ach of two Mid-Continent employees. The hearsay testimony is likely a sele
ynopsis of one or more interviews "seasoned" with the passage of time. Acc
e find that the ALJ erred in basing his rejection of the Mid-Continent cust
nd practice defense on the conclusion and finding that specific words were
ttered by declarants Cerise and Theil 5/. Indeed the error is compounded i
iew of the fact that the ALJ relied on identical evidence in ruling, on a
elated citation, that Mid-Continent properly maintained its methane monitor
aintenance program 6/.

For the foregoing reasons we would reverse the ALJ and vacate the citat

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

5/ It should also be stated that the ALJ and majority (see majority decision
f.n. 9) appear not to appreciate the fact that it would be legally permissib
for Marge Theil to have deviated from the Mid-Continent custom and practice

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Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
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ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 82-328
	:	
UNITED STATES STEEL MINING CO., INC.	:	

DECISION

On April 19, and June 1, 1982, inspectors from the Department of Labor's Mine Safety and Health Administration (MSHA) cited U.S. Steel Mining Company, Inc. for violations of mandatory safety standards at its Dilworth Mine. One citation alleged that U.S. Steel failed to comply with its approved ventilation plan in violation of 30 C.F.R. § 75.316. The other citation alleged that loose, dry coal and float coal dust were permitted to accumulate under and around the tail piece of the belt conveyor in violation of 30 C.F.R. § 75.400. On both citation forms the inspectors marked a box to indicate their finding that the alleged violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. Both violations were abated within the time set by the inspectors. Pursuant to the Secretary of Labor's penalty assessment procedures set forth at 30 C.F.R. § 100.3, MSHA proposed a $225 penalty for the violation of § 75.316 and a $112 penalty for the violation of § 75.400. U.S. Steel declined to pay the proposed assessments and exercised its statutory right to obtain a hearing before this independent Commission. Thereafter, the Secretary of Labor filed a petition with the Commission seeking civil penalties for the alleged violations. U.S. Steel's answer denied that the violations were properly classified as "significant and substantial" and asserted that the penalties should be reduced to $20 per violation "since none of the conditions cited had a reasonable possibility of causing a significant injury."

Following U.S. Steel's answer, an administrative law judge of the Commission ordered the parties to confer concerning possible settlement and to stipulate as to any matters not in dispute. Subsequently, the Secretary modified both citations to state that the violations were "non-significant and substantial" and presented no likelihood of injury. The parties then agreed to settle the matter, and the Secretary moved the administrative law judge to approve the settlement. In his motion for

not bound by the Secretary's regulation at 30 C.F.R. § 100.4. At the hearing before the judge the Secretary presented evidence regarding the existence of the violations, their gravity, the operator's negligence, the abatement of the cited conditions and the history of previous violations at the mine. 2/ U.S. Steel did not deny that the alleged conditions existed. Rather, it argued that the judge was bound by 30 C.F.R. § 100.4 and, consequently, that he was required to assess $20 penalties for each violation.

In his decision the judge again rejected this argument and held that he was required to make a de novo determination of the appropriate penalty amounts. 5 FMSHRC 934, 936 (May 1983)(ALJ). Citing the Commission's decision in Sellersburg Stone Company, 5 FMSHRC 287, 291 (March 1983), appeal docketed, No. 83-1630 (7th Cir. March 11, 1983), the judge held that he was bound by section 110(i) of the Act rather than by the Secretary's penalty assessment regulations and that he was required to determine the amount of each penalty by applying the six penalty criteria listed in section 110(i) in light of the evidence of record. The judge then made findings with respect to the penalty criteria and assessed a $75 penalty for each violation. 5 FMSHRC at 936-37.

On review U.S. Steel renews its argument that when a violation meets the criteria set forth in 30 C.F.R. § 100.4, the Secretary of Labor's so-called "single penalty regulation", a Commission administrative law judg must assess a $20 penalty. U.S. Steel's argument evidences a continued misunderstanding of the civil penalty scheme of the Act and of the discrete roles of the Department of Labor and this independent Commission in effectuating that scheme. We previously have addressed this subject on

1/ 30 C.F.R. § 100.4, a regulation adopted by the Secretary, provides:

> An assessment of $20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will be processed through either the regular assessment provision (§ 100.3) or special assessment provision (§ 100.5).

2/ The parties stipulated as to U.S. Steel's size and that the assessment of penalties would not affect its ability to continue in business.

eiterate our previous holdings in an attempt to dispel any lingering mis
onceptions.

The Mine Act divides penalty assessment authority between the
ecretary of Labor and the Commission. The Secretary proposes penalties.
he Commission assesses penalties. The Secretary's penalty proposals
re made before hearing. In the event of a challenge to the Secretary's
roposal, the Commission affords the opportunity for a hearing. Thereaft
he Commission assesses penalties based on record information developed
n the course of the adjudicative proceeding. Sellersburg, 5 FMSHRC at
90-91, Arkansas-Carbona, 5 FMSHRC at 2044-46. In assessing a penalty
he Commission and its judges are required to consider the six statutory
enalty criteria set forth in section 110(i) of the Act (30 U.S.C. § 820(
hus, the Commission's penalty assessment is not based upon the penalty
roposal made by the Secretary, but rather on an independent consideratio
f the six statutory penalty criteria and the evidence of record pertaini
o those criteria. Sellersburg, 5 FMSRHC at 291-92, Shamrock Coal, 1 FMS
t 469. The Commission's independent penalty determination and assessmer
ased upon the statutory criteria of section 110(i) of the Act, applies i
ll cases contested before the Commission.

The Act does not condition the penalty assessment authority and duti
f the Commission upon the manner in which the Secretary of Labor has
hosen to implement his statutory responsibility for proposing penalties.
herefore, it is irrelevant to the Commission for penalty assessment
urposes whether a penalty proposed by the Secretary in a particular
ase was processed under § 100.3, § 100.4, or § 100.5 of the Secretary's
egulations. The distinctions that U.S. Steel attempts to draw in this
roceeding between a § 100.3 or § 100.4 penalty proposal by the Secretary
re without merit and are rejected.

U.S. Steel further argues that even if the Act literally requires th
ommission and its judges to consider the six penalty criteria when asses
ng a civil penalty, we nevertheless should hold, as a matter of policy,
hat when a violation poses little probable harm it will not be assessed
through consideration of all six statutory penalty criteria. U.S. Steel
dopts the Secretary's position, as published in the comments accompanyin
he promulgation of the Secretary's Part 100 regulations, that "when the
ravity factor is low and good faith is established through abatement, ..
nalysis of the negligence, size and history criteria is [not] appropriat
r necessary." 47 Fed. Reg. 22292 (May 1982). We decline to accept U.S.
teel's suggestion. Such a policy would, in our opinion, unwisely restri

Accordingly, the decision of the administrative law judge is firmed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Usasch, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

v.	:	Docket No. WEVA 83-124-R
	:	Citation No. 2001887; 3/4
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Gary No. 50 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-219
	:	A.C. No. 46-01816-03519
v.	:	
	:	Gary No. 50 Mine
U.S. STEEL MINING CO., INC., Respondent	:	
UNITED MINE WORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: Louise Q. Symons, Esq., U.S. Steel Mining Co. Inc., Pittsburgh, Pennsylvania for Contestant Respondent;
James B. Crawford, Esq., Office of the Solici U.S. Department of Labor, Arlington, Virginia for Respondent/Petitioner;
Mary Lu Jordan, Esq., United Mine Workers of America, for Intervenor.

Before: Judge Kennedy

The captioned review-penalty proceedings came on for an evidentiary hearing in Pittsburgh, Pennsylvania on March 15, 1984. The gravamen of the charge was the operator's refusal to pay a union walkaround for time spent participating in a "Ventilation Technical Inspection" in violation of section 103(f) of the Mine Safety Law. The operator challenged the validity of the citation and the penalty assessed on the ground the activity was not an "enforcement inspection" within the meaning of section 103(a).

argument counsel for the operator pointed out that section 103(a) prohibits advance notice of any enforcement inspection and section 110(e) makes it a misdemeanor punishable by a fine of up to $1,000 and imprisonment for up to six months for any person to give advance notice of such an inspection.

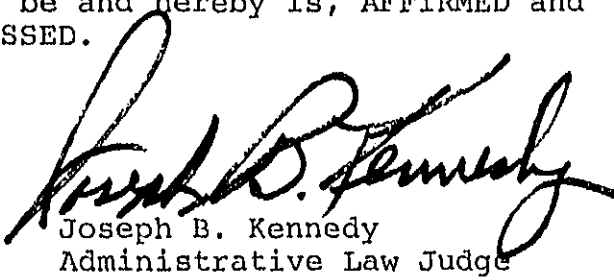
The solicitor opposed the motion stating "there is advance notice of all inspections" and more particularly of the four quarterly inspections mandated by section 103(a) of the Act. The solicitor declared there has never been a prosecution for violating the advance notice prohibition and expressed confidence that the department would take no advers action against an inspector for doing so. 1/

Despite the solicitor's zeal to compel testimony that might violate the inspector's Fifth Amendment rights, the trial judge refused to allow the inspector to testify unless given appropriate use immunity. 2/ 18 U.S.C. § 6002. Under the Omnibus Federal Immunity Statute, only the Attorney General or his duly authorized representative may approve issuance of an immunity order by administrative agencies of the United States. 18 U.S.C. § 6001, 6002, 6004. Unfortu-aately, the Federal Mine Safety and Health Review Commission is not an agency authorized to issue an immunity order.

1/ If the solicitor's statements accurately reflect MSHA pol they would seem to confirm the widespread impression that MSHA is openly flouting the prohibition against giving advance notice of enforcement inspections. In my recent decision in Pontiki Coal Corporation, 6 FMSHRC _____, March 30, 1984, I called for an inspector general's investigation of what appeared to be a flagrant violation of the advance notice prohibition. I am advised that a "file" was opened but that no field investigation commenced because the investigator assigned to the matter went on "vacation". The matter seems to have been prejudged by the Assistant Secretary for Mine Health and Safety, Mr. Zegeer. On April 1 1984, the press quoted him as saying "everything was done by the book" and that his investigation showed "the inspectors did everything exactly the way they were supposed to do it." If what the solicitor said is correct, "doing it by the book" may well be part of the problem.

judge refused to allow the solicitor to put the witness in jeopardy, the solicitor, after consultation with his superio moved to vacate the citation and dismiss the proposal for penalty. The operator having no objection, the trial judge entered an order from the bench granting the motion to vacate the citation and dismissing the proposal for penalty.

The premises considered, it is ORDERED that the bench decision of March 15, 1984, be and hereby is, AFFIRMED and the captioned matters DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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ADMINISTRATION (MSHA),	:	Docket No. CENT 81-271-M
Petitioner	:	A.C. No. 29-01375-05008F
v.	:	
	:	Mt. Taylor Project Mine
GULF MINERAL RESOURCES COMPANY,	:	
Respondent	:	

DECISION

Appearances: Eloise V. Vellucci, Esq., Office of the Solicito
U. S. Department of Labor, Dallas, Texas,
for Petitioner;
John A. Bachmann, Esq., Gulf Mineral Resources
Company, Denver, Colorado,
for Respondent.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the "Act"), arose from a March 2, 1981 inspection of respondent's Mt. Taylor Project Mine. The Secretary of Labor seeks to impo two civil penalties because respondent allegedly violated the Act and a regulation promulgated under the Act.

Respondent denies that any violations occurred.

After notice to the parties, a hearing on the merits was held in Albuquerque, New Mexico on June 1, 1983.

Respondent filed a post trial brief.

Issues

The issues are whether respondent violated the Act and th regulation.

Stipulation

The parties agreed that at the time of the inspection the size of the company was 1,120,484 production pounds per year. The size of its Mt. Taylor Project uranium mine was 872,540 pr

> injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent
>
> (B) interferes with, hinders, or delays the Secretary or his authorized representative, ... in carrying out the provisions of this Act ....

Prior to the hearing the judge advised the parties that pertinent provision of the Act was Section 103(a) and not th cited section. [Order, February 28, 1983; Waukesha Lime and Company, Inc., 3 FMSHRC 1702 (1981)].

Pursuant to the Federal Rules of Civil Procedure the co is amended to allege a violation of Section 103(a) of the Ac Rule 15(b), F.R.C.P.

The pertinent part of Section 103(a) provides as follow

> ...For the purpose of making any inspection or investigation under this Act, the Secretary ... with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary... have a right of entry to, upon, or through any coal or other mine.

Summary of the Evidence

MSHA's evidence indicates that at approximately 11:40 a March 2, 1981, Thomas Castor, the supervisory mining inspect MSHA Albuquerque office was advised of a fatality at respond mine. The supervisor dispatched a special investigator and inspectors to the mine (Tr. 7-9, 13). The three men travell the mine in two vehicles. Since the mine was approximately miles from Albuquerque, they had to pick up clothing at thei in anticipation of an overnight stay (Tr. 9).

ners at the reporting mine (Tr. 30, 33).

The accident at this mine occurred at 9:45 a.m. Since MSHA s not advised until 11:40 a.m., respondent was cited for a viol 30 C.F.R. § 50.10. 1/ That citation is now a final order of t ommission (Tr. 10, 11).

Inspector Omer Sauvageau reached the mine at 3:30 p.m. He aited at the mine office for Inspectors Tanner and Sisk who arri t 3:45 p.m. to 3:50 p.m. (Tr. 95, 96).

Inspector William Tanner, Jr. estimates that he arrived at ine between 3:00 and 3:30 p.m. In the meeting room they introdu nemselves to respondent's representatives John Thompson and Davi olfe. Tanner asked if they could interview the two eyewitnesse nd the two location witnesses so they could continue their in- estigation. Company representative Dershimer said the witnesse ere not available because they were being interviewed by the co ttorney (Tr. 37, 38, 40, 60, 95, 96). At that point L. E. Lewi ent to check. Upon returning, Lewis said it would be another 0 minutes before the MSHA inspectors could interview the witnes ewis suggested the inspectors go underground to visit the scene ney did (Tr. 38, 39). The only comment, which was repeated to nspectors, was that it was Gulf's policy for their attorneys to onfer with its witnesses before MSHA inspectors could talk to t ne company did not state to the inspectors that they were con- ucting their own investigation (Tr. 39, 63). For their part, t nspector did not suggest they should join the company attorney Tr. 61, 62).

Inspector Tanner told Wolfe the company would be cited and ssued Citation 152663 for a violation of Section 108(b) of the ct. The citation was given to the company three days later. It as issued because the witnesses were not available. The MSHA nvestigation was delayed and hindered at the scene because the nspectors could not get the comments of the witnesses firsthand Tr. 41-43, 71, 72). The witnesses were interviewed at 6:00 p.m. hat day (Tr. 43).

/ 30 C.F.R. § 50.10 Immediate Notification.

before the MSHA inspectors arrived (Tr. 102, 103, 113, 114).

After the MSHA inspectors arrived, Cullen requested an additional 20 to 30 minutes to complete his interviews. 2/

Respondent's manager F. K. Dershimer requested that the in spectors make the trip underground while Cullen continued his interviews. The inspectors voiced no objection, nor did they g an indication that they felt they were being delayed, hindered or inconvenienced (Tr. 104-106, 114, 115). The MSHA inspectors as suggested, went underground (Tr. 106). The first notice of dissatisfaction with this arrangement was when Dershimer receiv the citation (Tr. 107, 116, 117).

If the inspectors had requested a joint interview of the witnesses Dershimer would have checked with Cullen to see if it was "okey" (Tr. 115, 116). Respondent has never prohibited in- spectors from talking to company witnesses. Further, there is no such company policy (Tr. 105, 115, 116).

2/ The record does not reflect the purpose of these interviews But in view of the fact that the safety officer and company att were present on the day of the accident, I infer the operator w conducting its investigation pursuant to 30 C.F.R. § 50.11(b). cited regulation provides, in part,:

> (b) Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation. No operator may use Form 7000-1 as a re- port, except that an operator of a mine at which fewer than twenty miners are employed may, with respect to that mine, use Form 7000-1 as an investigation report respecting an occupational injury not not related to an accident. No operator may use an investigation or an investiga- tion report conducted or prepared by MSHA to comply with this paragraph. An operator

company attorney requested additional time to interview the wi
nesses. This scenario, at best, establishes that respondent
minimally interfered with the sequence in which MSHA prefers t
conduct its investigation. But, construed in a light most fav
able to MSHA, these facts would not constitute a denial of the
Secretary's right to enter the mine.

Section 50.11(a) of Title 30 of the Code of Federal Regul
provides for accident investigations to be performed at the di
cretion of MSHA district or subdistrict managers. Once the de
to conduct an investigation has been made, Section 103(a) of t
Act provides MSHA inspectors with broad powers in the exercise
such an investigation. An inspector has the right of entry in
mine. While 30 C.F.R. § 50.11(a) requires that notice be give
prior to the investigation of accidents, the Supreme Court has
held that no warrant is required to conduct such an inspection
Donovan v. Dewey, 452 U.S. 594, 101 S. Ct. 2534 (1981). Howev
neither the Act nor any implementing regulations mandate the i
viewing of witnesses as the initial step in an investigation.

Accordingly, on the facts I conclude that no violation of
Section 103(a) occurred. Citation 152663 and all penalties
should be vacated.

Citation 152667

This citation charges respondent with violating Title 30,
Code of Federal Regulations, Section 57.8-2, which provides:

> Mandatory. (a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

Summary of the Evidence

MSHA Inspector William Tanner, Jr. issued Citation 152667
because two men with authority at this particular work place
failed to insist on the crew following the proper procedure fo

one qualified by ability and experience, who makes safety ch
prevents unsafe acts, and who works in this particular area
mine (Tr. 45, 53, 88). There was nothing to indicate to the
that a safety check had been made or that a competent person
looked over the area before everyone "got into place" (Tr. 4

Sullivan, the level superintendent, came in about 9:30
and talked to leadman Baca about changing out the steel post
(Tr. 47).

At the intersection of 3N and 3E, the place of the acci
cap goes directly across the back. It is supported by two p
These posts are steel I-beams 8 inches by 8 inches and 10 fe
(Tr. 47). The cap is bolted by four bolts on each end (Tr.
A collar brace, a knee brace, and a toe brace tie all of thi
together to keep it from falling (Tr. 47).

According to the miners, on this particular day they cu
all the collar braces off one side with a torch. The other
had only one collar brace. The inspector did not know why i
was not supported (Tr. 48). At approximately 9:30 a.m., Sul
and Baca discussed changing the post. Sullivan left without
looking to see if the area was safe. At that time victim Ma
was driving up with the replacement, a slightly larger post

When Sullivan was at the intersection there was one col
brace on one side and none on the other (Tr. 49). Normal pr
to remove and replace a post is to stick a direction boom un
cap and hold it up while a worker removes the bolts. After
bolts are removed the post is withdrawn and replaced with th
post while the boom holds up the 2,000 pound cap. The cap i
measures 21 feet by 21-1/2 feet (Tr. 49, 50).

The normal way to unscrew the bolts would be to climb u
ladder and remove them after the cap has been secured. On t
particular day Maldonado climbed on top of the erection boom
was jockeyed into position. Barela handed him a one-inch im
wrench and Maldonado spun off the bolts without making sure
area was secured in any way.

After the bolts were spun off the cap leaned over. As
did, Maldonado climbed off of the erection boom pedestal (wh

r supported by the pedestal (Tr. 52).

The company said Baca and Sullivan were designated "compete
ersons." Sullivan told the inspector he did not investigate bu
e instructed the leadman in his duties (Tr. 53, 81-82). John
hompson and David Wolfe told the inspector they were "competen
ersons" and so designated by the company (Tr. 80-81).

The inspector did not check the log books from previous
hifts to see who had signed the logs as the designated person
Tr. 82, 83).

This crew had changed out the post on the opposite side of
he drift the previous day (Tr. 88). On that occasion, Maldona
ho was then the leadman, performed the same task (Tr. 91-92).

Respondent's evidence: F. K. Dershimer, the acting genera
anager, testified that the mine captain designates the level
upervisor as the "competent person," for the purpose of the
egulation. If the level supervisor is not present, then the
ine captain does the walk-through for safety checks or he desi
ates another person. Compliance with the walk-through is reco
n the shift report under the portion marked as "Supervisor".
he time of the safety check, followed by the supervisor's init
re also entered on the shift report (Tr. 118, 119, Exhibit R 1
f the supervisor saw something that needed to be fixed he woul
o direct (Tr. 123).

James Sullivan was in the employ of respondent between
anuary 30, 1978 to May 14, 1982. He has 12 years of mining ex
erience. He was hired as a long-hole driller and later was
romoted to level supervisor, then to level foreman (Tr. 129-13
52). Sullivan's experience in replacing posts has come about
atching Harrison & Western crews, in inspecting, and as a helpe
n installing steel (Tr. 162). Sullivan considered himself comp
ecause he has used good judgment in putting up steel (Tr. 162)

Lead miner Baca had the responsibility for watching this cr
nd seeing they work safely (Tr. 158, 159). But only Sullivan,
ot Baca, had the responsibility to check the entire level (Tr.

On the day before this accident the same crew had changed

replacement post (Tr. 166). Normally the crew would autom
install a collar brace (Tr. 169).

The MSHA regulation requires one safety inspection by
"competent person". Respondent requires two. On the day
fatality, inspections were performed by Ray Willis during
day shift. If Sullivan had not been required to leave the
he would have done the inspections and signed the logs (Tr
169, Exhibit R 1).

Discussion

MSHA's regulation, Section 57.18-2, imposes two broad
ments on an operator.

The first: The operator shall designate a person who
petent to examine each working place each shift for condit
may adversely affect safety or health.

The second: If there are defective conditions, the o
through his "competent person," shall initiate appropriate

We will review these requirements in the light of the
in the case. First of all, did respondent designate a per
examine each working place?

Yes, I find that witness James Sullivan was so design
by the company. He so testified. Further, the company re
(Exhibit R 1) establish that Sullivan, as supervisor, init
and indicated the times of the safety checks on March 3 an
He would have performed the safety checks on March 2 but,
the accident, he went to the surface.

The inspector testified there was nothing to indicate
"competent person" had looked over the area. But I am not
by the inspector's testimony. He admits he did not check
company logs on this point.

Was Sullivan competent as a safety inspector?

Yes, I find that Sullivan's broad experience includes
as a miner. He was hired as a long-hole driller, promoted

competent did not examine the work place before work commenced
If the Secretary had intended a pre-shift inspection he could
have done so as he did in 30 C.F.R. 57.3-22 and 57.19-129.

An additional element filtering through the evidence is th
Baca, the lead miner, or for that matter anyone in charge of th
crew, was the "competent person" under the regulation. Therefo
such a "competent person" would have prevented the unsafe acts.

I reject such a view of the regulation. On the facts,
neither Baca nor anyone in the crew were so designated by the
company as the "competent person" at the time of the accident.

A secondary factor appearing in MSHA's evidence is that th
"competent person" should have been present when all of the wor
were "in place." If so, he could have stopped Maldonado's unsa
acts.

The regulation does not require the "competent person" to
anticipate unsafe acts by an employee. This record establishes
that the changing of the post was not inherently dangerous. In
addition, the crew was experienced. Maldonado had himself remo
the post on the opposite side of the drift on the previous shif
Further, he recited the proper procedure to Sullivan. The crew
was told to proceed as before. For the foregoing reasons, I
conclude that respondent complied with the initial portion of
the regulation; namely, the company designated a competent pers
to examine the work places.

The second broad requirement of the regulation mandates tha
the competent person initiate appropriate action if there is a
defective condition. Simply put, was there a defective conditi
when Sullivan was present?

No, at the time Sullivan was present the most unfavorable
scenario was that the post being changed out was not collar bra
But no evidence establishes that this in and of itself is a
defective condition. Even without the collar brace the steel
was also tied together with a knee brace, a toe brace and secure
by four bolts. Sullivan was at the intersection of Drift 3N-3E
at approximately 9:35 a.m. to 9:40 a.m. on March 2, 1981. At
that time Maldonado was driving the loader in with the replaceme
post (Exhibit R 2). There was nothing to indicate to Sullivan

I reject that position. If the facts had established that a defective condition existed at any time when Sullivan was present and he failed to take corrective action, I would affirm the citation.

For the reasons stated herein Citation 152667 should be vacated.

Brief

Respondent's counsel has filed a detailed brief which has been most helpful in analyzing the record and defining the issues. I have reviewed and considered this excellent brief. However, to the extent that it is inconsistent with this decision it is rejected.

ORDER

Based on the facts found to be true in the narrative portion of this decision, and based on the conclusions of law as stated herein, I enter the following order:

1. Citation 152663 and all proposed penalties therefor are vacated.

2. Citation 152667 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

Eloise Vellucci, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, Texas 7 (Certified Mail)

TARY OF LABOR, : CIVIL PENALTY PROCEEDING
E SAFETY AND HEALTH :
INISTRATION (MSHA), : Docket No. PENN 83-131
Petitioner : A.C. No. 36-03425-03521
v. :
: Maple Creek No. 2 Mine
STEEL MINING CO., INC., :
Respondent :

DECISION

rances: Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., Pittsburgh, Pennsylvania, for Respondent.

e: Judge Koutras

Statement of the Case

This case concerns a civil penalty proposal filed by the ioner against the respondent pursuant to section 110(a) e Federal Mine Safety and Health Act of 1977, 30 U.S.C.), seeking a civil penalty assessment in the amount of for one violation of mandatory safety standard 30 CFR 4. The violation was cited in a section 104(d)(1) issued on December 9, 1982.

The respondent contested the proposed assessment, and the was docketed for hearing in Uniontown, Pennsylvania, on 27, 1984, with five other cases involving these same es. However, when this docket was called for trial, the es advised me that the respondent decided to withdraw ontest and request for a hearing, and agreed to pay the amount of the $650 civil penalty assessment.

Discussion

In view of the foregoing, and in light of the agreement e parties to dispose of this matter by the respondent's st to withdraw its contest and to pay the full penalty sment, I considered the request as a motion to approve a

pleadings filed, including the conditions and practices cited by the inspector in the order which he issued, I granted the motion and concluded that the proposed settlement was in the public interest, and it was approved from the bench (Tr. 6-8).

Order

Respondent is ordered to pay a civil penalty in the amount of $650 in full satisfaction of 104(d)(1) Order No. 2102664, and payment is to be made within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., 600 Grant St., Pittsburgh, Pa 15230 (Certified Mail)

LOUIS E. HENDERSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 83-48-DM
v.	:	
	:	MD 83-13
LORING QUARRIES, INC., Respondent	:	Loring Mine

DECISION

Appearances: Bryan E. Nelson, Esq., Alder, Nelson & McKenna, Kansas City, Kansas, for the Complainant; Kenneth J. Reilly, Esq., Boddington & Brown, Kansas City, Kansas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint file by the complainant against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed pro se after the complainar was advised by MSHA that its investigation of his complaint disclosed no discrimination against him by the respondent. Subsequently, the complainant retained private counsel to represent him in this proceeding.

The basis for Mr. Henderson's discrimination complaint is the assertion that he was discharged by the respondent because of his refusal to work in an area which he believed to be hazardous, and his summoning of certain MSHA inspectors to the mine to investigate his safety complaint. Respondent denies any discrimination, and asserts that Mr. Henderson was discharged for insubordination and that his discharge was solely because of a legitimate business purpose and not because of any protected activity on Mr. Henderson's part.

The matter was heard at Kansas City, Missouri on December 6, 1983, and the parties have filed posthearing proposed findings and conclusions which I have considered in

justified because of insubordination, as claimed by the respondent.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

Louis E. Henderson, Jr. testified that he was first emp by the respondent on September 2, 1981, and that his last day of employment was November 25, 1982. He confirmed that he is unemployed and that his last position was as a "powde man" (Tr. 6). He stated that when he was discharged by the respondent he was told that he was being fired "for negligen of equipment, which consisted of a low tire on my air compre (Tr. 6). He confirmed that he inspected the equipment whic he used to perform his duties on a daily basis, and he testi as to his training as a powderman for the respondent (Tr. 9-

Mr. Henderson explained that the mine in question is a limestone mine, and he indicated that he began working in th respondent's open pit mine but later moved underground where a new mine was being started (Tr. 12). He indicated that "it had about two shots taken out of the fact before I start it," and he described the mine entry as a 13-foot wide entra and as one advanced into the mine the floot-to-ceiling heigh was approximately 11-1/2 to 12 feet. In November 1982, the mine had six or eight headings (Tr. 14).

Mr. Henderson identified the general mine superintende as Bill Feathers, and he confirmed that Mr. Feathers was the person who hired and fired him. He identified the quarry owner as Ron Stanley, and the mine mechanic as Steve Folsom. Mr. Henderson stated that it was his job to report any low tire on his equipment, and Mr. Folsom was the person who would take care of it (Tr. 17). Tires were inflated by

to detonate it with an electrical charge after leaving the circuit. The shot was actually detonated while he was located several pillars away, but during the loading process he would be under the seam (Tr. 18-19). After blasting, approximately 12 feet of material would be removed, and the seam extended out from the fact for a distance of 12 feet after each shot. He described the seam as follows (Tr. 20-21):

> Q. And this limestone seam that you described, how would that appear after a blast?
>
> A. Well, you could plainly see it--it was up there. You could plainly see a seam between the ceiling and the limestone seam.
>
> Q. How far did it extend from the fact?
>
> A. About 12 foot, about.
>
> Q. In other words, it would be pretty much be the extent of the area you blasted out?
>
> A. Oh, yes, yes. Then you would set off the next shot. That seam would fall and there would be another one. This was after every shot.
>
> Q. Now, tell us what else you observed about that seam. Can you give us any idea of how much space there was between the ceiling and the top of the seam?
>
> A. Well, it depends. Sometimes it would look loke it was tight, flush up against the ceiling. Other times I could get up on my loader bucket and I could stick my hand back there. It had sagged down eight or ten inches. I could stick a crowbar in there and I couldn't pry it down, but you could see it moving up and down, back and forth, all over. It was pretty loose.

Mr. Henderson testified that he first became concerned

one half of the heading and pulled out. Thirty seconds late the roof seam fell. He explained that he had "pulled out" in order to prepare the second half of the heading for loadi of dynamite. He had "pulled out" for a distance of some 10 yards (Tr. 25-26).

Mr. Henderson testified that when the first fall occurr on his truck he told only the driller about it. However, when the second fall occurred, he immediately advised quarry owner Ron Stanley about it, and Mr. Stanley advised him not to go under the roof seam if he believed it was dangerous, and Mr. Stanley also stated that "I'll guarantee you'll never hear me say anything if you don't go under it" (Tr. 27).

Mr. Henderson stated that after informing Mr. Stanley about the fall, Mr. Feathers came to look the area over. Mr. Henderson indicated that he simply wanted to show Mr. Feathers where the seam had fallen because he had previously asked the drillers and loader operators to try to pull down the seam with the loader bucket or to "tap it down" (Tr. 28).

Mr. Henderson described the seam which fell as the seam "that hangs up there after every shot." He confirmed that he did not inform Mr. Stanley or Mr. Feathers about the rock which fell on his truck. He explained that "I was scar of losing my job, didn't want to stir up trouble and everyth He then said that efforts would be made to take the loose material down with a drill or loader, and he confirmed that efforts were made to do this (Tr. 30-31). When asked whethe he had inspected the rock seam which fell on his truck, he replied that "I looked." He also indicated that he had no equipment or crowbars to scale the material down, but that h was given a crowbar after the second fall occurred (Tr. 32).

Mr. Henderson testified that after Mr. Feathers came to the scene of the second fall, the following occurred (TR. 33-35):

this, which was crazy to me. I don't see

JUDGE KOUTRAS (Interrupting): Just relate what he said now.

THE WITNESS: That's what he said.

JUDGE KOUTRAS: O.K.

BY MR. NELSON:

Q. Did you have any other conversation?

A. No. I asked him if he would get me some sort of a pry bar so I could try to test it, and he said, "Yes," and he brought me up a little crowbar. It's about three feet long.

* * * *

Q. What instructions, if any, did Mr. Feathers give you so far as working under the seam?

A. He told me to test it with the crowbar from then on. This was after the second incident.

Q. And what, if anything, were you to do after you tested it?

A. I don't know, really. He just told me to test --

JUDGE KOUTRAS (interrupting): No. Now, Mr. Henderson, after you tested it, if you found out that it was loose, what, in your experience, would you do, would you continue to work under it? What do you mean, you don't know?

THE WITNESS: You couldn't tell sometimes that it was loose.

* * * *

to? You would load it, wouldn't you, you would continue loading the shot if it was tight?

THE WITNESS: Well, the one that fell, though, Your Honor, was tight, too, though.

JUDGE KOUTRAS: O.K., but I am trying to understand what you would do as a reasonable person if you found that you had to go into an area after testing it and found that the roof was sound. That's your job to go under there, isn't it?

THE WITNESS: Not if I feel it is a hazard.

Mr. Henderson stated that later in the day after the cond fall he called MSHA Inspector Jim McGee at his Topeka fice after the roof seam had fallen and after he had spoken Mr. Stanley and Mr. Feathers, and that he did so because ney weren't scaling it down to my satisfaction, to where thought it was safe" (Tr. 37). Mr. Henderson then loaded e second half of the shot, and after he and Mr. Feathers sted it and found it "to be O.K.," he shot it down and then nt home (Tr. 38).

Mr. Henderson stated that he returned to the mine the xt day but refused to go under another heading because upon servation he believed that "it hadn't been pecked or ied to scale down at all." He confirmed that he tried to ale the roof material down while up in the bucket and at he "pecked around a bit." He indicated that it "seemed ght," and that he tested it with the bucket and pry bar, but t still refused to go under it because he was afraid that might come down again. He advised Mr. Feathers that he d not want to go under the roof, and he stated that Mr. Feathe ot irate with me, got mad," but that he did not instruct n to go under the roof (Tr. 41). He then called Mr. McGee ter in the day or that evening and advised him about his fusal to go under the roof seam (Tr. 42).

a whole." Mr. Henderson stated that he did not go with th MSHA inspectors, and that the second heading which concern him had not been shot down or loaded out and that it was "still hanging." Mr. Henderson was then summoned to the mine office with Mr. Stanley and the two inspectors, and h indicated that the inspectors told him that his complaint was justified, and that "there is a potential hazard there (Tr. 44).

In further explanation of the events after the inspec came to the mine, Mr. Henderson testified as follows (Tr. 48):

> Q. Did you look at it with the inspectors?
>
> A. No; I wasn't up there with them when they looked at it.
>
> Q. O.K. When you refused to go under there, ho far did that extend or stand out from the face?
>
> A. Well, this particular heading, I believe, had only had one shot taken out of it, so there was about 10 feet of overhanging rock hanging there of the seam.
>
> Q. And is it your testimony that 10 feet was overhanging when you refused to go under it?
>
> A. Yes, I would say about that. I believe there was only one shot out of it.
>
> Q. Now, what happened after the conversation you had with the inspectors? You have already told us that they said yes, there was a possible hazard.
>
> A. Well, they told Mr. Stanley and me that I was responsible along with the foreman to make a safe working place. I said, "Yes, that is fine, and he told Mr. Stanley that I was protected by the Justice Department, and all this stuff.

or not it should be scaled each time blasting was done?

A. No, I don't believe so.

Q. Was that the first time--when was the first time that you were informed that it was your responsibility to check that seam?

A. When they came, when the mine inspectors came down.

Q. Nobody told you that before that?

A. No. They showed me right out of the rule book.

Q. And if you found or considered it to be a problem from your inspection, what was your understanding then of what was to happen?

A. Well, I was to get with the superintendent or the foreman, you know, whoever the supervisor was, to try to work out a solution to the problem, try to scale it down somehow.

Q. Another possible alternative was to put some kind of canopy over the truck?

A. Right, among other things.

Q. What other things?

A. Like a mechanical scaler or something.

Q. You didn't have a mechanical scaler in there, apparently?

A. No, not at all.

Q. What devices did you have available to scale it?

Mr. Henderson asserted that approximately a week af he called the MSHA inspector, he had a conversation with Mr. Feathers, and Mr. Feathers told him he "was making waves and didn't have to call the MSHA inspectors down" (Tr. 48). Mr. Henderson stated that he had the conversa with Mr. Feathers after showing him a piece of rock whic had fallen from the roof. He explained the background a the conversation as follows:

> JUDGE KOUTRAS: You mean you walked into some place and found a rock that had fallen, and you picked it up?
>
> THE WITNESS: What I was trying to do, Your Honor, was just show him how thick the seam wa Your Honor.
>
> JUDGE KOUTRAS: But that wasn't the rock that fell the time that you pulled it after loading was it?
>
> THE WITNESS: No.
>
> JUDGE KOUTRAS: This was just a rock some plac
>
> THE WITNESS: No, it was off the ceiling.
>
> JUDGE KOUTRAS: Off the ceiling?
>
> THE WITNESS: Right, it was off the ceiling.
>
> JUDGE KOUTRAS: You just wanted to show him a representative sample if a rock fell?
>
> THE WITNESS: It was a big rock.
>
> JUDGE KOUTRAS: I can take judicial notice tha if a big rock falls on you, it is liable to ki you. Is that what you were trying to impress
>
> THE WITNESS: I was trying to tell him what wo happen if it fell.

that. He said, "You didn't have to call them people." He said, "I don't want you making waves around here," and that sort of thing. That's all I can remember specifically.

Q. How long did that conversation take?

A. How long did it last?

Q. Yes.

A. Less than five minutes.

Q. O.K., and what did you do after that?

A. I packed up my stuff, talked to Mr. Stanley.

Q. Did you tell Mr. Stanley you had called?

A. Yes, I informed him that I had called, too.

Q. What did he say?

A. He didn't say much. I can't remember what he said.

Mr. Henderson stated that after his conversation with Mr. Feathers, he began having "problems," and he described them as follows (Tr. 53):

A. Well, just little subtle hints, you know, and stuff just like I said, I made waves and things like that.

MR. REILLY: I am going to object--

JUDGE KOUTRAS (interrupting): Mr. Henderson, what I am interested in is was all this coming from Mr. Feathers.

THE WITNESS: Yes.

A. Twice, I believe. This is all within a week--

Q. (Interrupting) You have got to be specific about these things that were said.

JUDGE KOUTRAS: It is not necessary for him to be that specific, counsel. His testimony is that subsequent to the time he called the inspectors, Mr. Feathers was giving him a "hard time" by reminding him on at least two occasions that he was a troublemaker, making waves.

Is that the essence of it?

THE WITNESS: Yes.

Mr. Henderson stated that he was discharged approximately
wo weeks after the inspectors came to the mine, and that he
as told that he was being fired for "negligence of equipment,"
nd he described the incident which precipitated his discharge
s follows (Tr. 54-57):

A. O.K. I got to work in the morning at 7:30, looked over my equipment, noticed I had a low tire on my air compressor--

Q. (Interrupting) Now, where was your equipment?

A. It was parked down in the mine.

Q. How did you inspect it, with your light and all that?

A. Yes, with my head lamp.

Q. When you find a low tire, what do you do?

A. I told Steve Folsom, the mechanic, about it, that I needed an air hose.

Q. Now, what did you have to do to tell Steve about it?

low enough to where it would really hurt anything. If you would have run it a long distance, it might of.

Q. So what did you do?

A. I told Steve Folsom that I needed an air hose.

Q. What did he tell you?

A. He said he was busy, that he was starting up the dump trucks and stuff, getting them warmed up. I said, "O.K., I'm going to limp on down here to the powder house, I'm going to start making my shots up, go down there real slow. When you get time, come down there and we will air it up." He said, "O.K. Fine."

Q. O.K., now, why did you go ahead and start work when you had a low tire?

A. Well, because it is a pretty pressing--see, I was the only powderman at the time. I was keeping the whole place running. To keep them in rock, you have to get started early in the morning and get right to it or you will fall way behind and be there until midnight.

Q. You were there a long time, then?

A. Oh, yes, every day.

Q. Now, is that the reason that you went ahead and started work?

A. Yes.

Q. Were you concerned that you might cause damage to the tire?

A. No, not at all.

A. I was down at the powder house making up my shots, and here come Mr. Feathers, pulled up--I didn't even know what was going on--pulled up, jumped out of the truck, started cussing at me--I'm not going to repeat what he said--but started cussing and told me, you know, get out, said I was fired, you know. He said that is what he was going to put on the report is negligence of equipment, and I said, "Why?" and he says, "Because you didn't air that tire up," and I said, "Well, you know, that's not much to fire me on, you know," and he said, "Get out, get out of my sight before I do something I'm sorry for." He did assault me, but there was no witnesses.

Q. What do you mean, he assaulted you?

A. Grabbed me, threatened to hit me.

Mr. Henderson testified that he was aware of other incident of equipment misuse but that no action was taken against the employee. He cited an incident involving a pick-up truck which was during too fast colliding with a dump truck, but that nothing was done about it. He also stated that he has observed "trucks hot-rodded around," but he was not aware of any other employees being fired or disciplined over these incidents (Tr. 58). He confirmed that employees had been "talked to" by supervisors, and that he had been previously warned by Mr. Feathers about "driving too fast" sometime in late September or early October 1982. He denied that any other disciplinary action had ever been taken against him for misusing equipment (Tr. 59). He believed he was fired because he called the MSHA inspectors and because other employees had not been disciplined for "things a lot worse," and he was fired over a low tire on his compressor (Tr. 60).

On cross-examination, Mr. Henderson identified exhibit R-1 as his handwritten complaint filed in this matter (Tr. 62). He confirmed that his first experience with a rock fall occurred in October 1982 when he began to experience some rock ledge formation that continued to cling to the ceiling

In response to further questions, Mr. Henderson testi as follows (Tr. 66-70:

> Q. So the first time you ever complained to any official at the quarry, either your superintendent or his superior, about the proble the responses were, "Don't go under anything that you consider to be an unsafe condition, and I'll come up right away and take a look at it with you?"
>
> A. No, that's what Mr. Stanley said. Mr. Feath didn't say anything.
>
> Q. Mr. Feathers said, "I'll be right up and look at it," didn't he?
>
> A. No, he didn't say that.
>
> Q. He came right up and looked at it, didn't he
>
> A. It was later, about two hours later, that afternoon. He said, "Let's go take a look at it," and that's what we done.
>
> Q. And at that time, as far as you were concern the condition was not unsafe, was it?
>
> A. Yes, I was pretty scared then.
>
> Q. I didn't ask you whether you were scared. I asked you if it was an unsafe condition.
>
> A. Out there then, after the second time? Yes, I would consider it.
>
> Q. Did you take a bar and try to pry it down to see if any rock came down?
>
> A. Yes.
>
> Q. Did any rock come down?

A. It appeared tight, but the edge of it wiggled a little bit; but the seam as a whole was tight, seemed tight.

Q. And at that time, you were handed a bar or given a bar by Mr. Feathers so that you could, and were instructed to test it any any time you felt it needed to be tested?

A. Right.

Q. And did you do that again?

A. Did I test before I went under these headings again?

Q. Right.

A. Yes.

Q. You only went under the heading one more time didn't you?

A. Well, yes, O.K., yes, the one where there was one shot out, yes, one shot out. Then I refused.

Q. The next day you went back to Mr. Feathers and said, "I'm not going to go back under that thing again?"

A. Right.

Q. In fact, Mr. Feathers said, "Did you test it with your bar," didn't he?

A. I can't remember.

Q. And you said, "No," didn't you?

A. I can't remember whether he asked me or not.

Q. And after you said no, then he got angry with

A. I can't remember that. If that is what it was over or not, I can't say.

Q. Mr. Feathers, when you told him that you called MSHA, said, "Why did you call them, why didn't you come to me first so we could correct any situation that you found to be unsafe," didn't he?

A. I can't remember exactly what he said now.

Q. Isn't that approximately what he said to you?

A. I can't say for sure. I'll say maybe that's what he said, I don't know. It's hard to remember conversations way over a year ago.

Q. When Mr. Feathers had the conversation with you about--when he was talking with you about how you might get killed on the highway, he was trying to calm you down, wasn't he?

A. No.

Q. You were very excited, weren't you?

A. No.

Q. He wasn't trying to calm you down?

A. No.

Q. He didn't state--

A. (Interrupting) He was trying to rationalize me going under that ceiling again, and I wasn't going to do it.

Q. And you didn't view that as an effort to calm you down?

A. When I am pushed, just like anybody else, I guess.

Mr. Henderson stated that he could not recall the conversations with Mr. Feathers at the time he advised him that he would not go under the roof, and he stated that he was not sure whether Mr. Feathers tested the roof and that nothing came down (Tr. 71). He conceded that all of the events surrounding his complaining spanned a period of eight days from November 18 to November 26, 1982 (Tr. 71).

Mr. Henderson stated that he could not remember running the compressor on a flat tire in the past. While he indicated that he would not disagree with any testimony that he did, "I would just say I can't remember" (Tr. 73-74). With regard to his encounter with Mr. Feathers over the compressor tire, he stated as follows (Tr. 74-76):

> Q. What was it you said to Mr. Feathers that made him so irritated after he called --
>
> A. (Interrupting) After he called me a little f...er, I called him a mother f...er, and that is when he grabbed me and threatened to hit me, and he said I was fired before that.
>
> Q. He said you were fired after you said, "F... you, you old f...er," didn't he?
>
> A. He grabbed me, he tried to grab me; and that is when I got mad. He reached over the tongue of the air compressor and tried to grab me. He assaulted me. He actually bodily touched me, and that is when I got mad, and I was trying to defend myself any way I could. I didn't want to get in a hassle down there in the mine. I had dynamite strung all over the place trying to make up my shots, and that's when he came --
>
> * * *
>
> Q. After you said what you said to Mr. Feathers, he said, "You are fired. Get out of here?"

A. Right.

And, at (Tr. 79-80):

Q. So Mr. Stanley said, "Well, calm down now, calm down. Let's see if we can't get this worked out," didn't he?

A. Right.

Q. He said, "I hate to see people get fired," didn't he?

A. That's right, that's what Mr. Stanley said, something to that effect.

Q. Something to that effect. He said, "You sit down in this room, and I will go get Bill and we will see if we can straighten this out," didn't he?

A. Yes.

Q. So at some point, you and Mr. Stanley and Mr. Feathers were all sitting in the car, weren't you?

A. Yes; this was over at the office.

Q. And at that point, Mr. Stanley was trying to resolve the whole situation so you weren't fired and you were calmed down and Bill was calmed down, didn't he?

A. What Mr. Stanley said was that he had to back up his superintendent, his foreman, whatever decisions he made. That's about all he said.

Q. At one point while you were sitting in that car, didn't you actually go beserk?

A. No, not at all.

Q. And at that point, didn't Mr. Stanley then fire you?

A. No.

Q. Didn't Mr. Stanley then say, "You're gone. I can't even talk to you?"

A. No.

With regard to his allegations of harassment by Mr. Fe Mr. Henderson testified as follows (Tr. 84-88):

Q. At no time did anyone at the quarry tell you that you had to work under what you considered to be an unsafe condition, did they?

A. They didn't directly say that, no.

Q. Now, you said that for the week-long period in between when you called MSHA and when you got fired, Mr. Feathers impliedly did this and sugges did that. Do you recall any single instance wher Mr. Feathers said anything to you?

A. Well, it's just the main instance that I remember, is when I told him that I had called MSHA, you know, and I told him no, that I wasn't trying to cause any trouble, and that is when he got mad.

Q. That's the only time you can recall Mr. Feath saying --

A. (Interrupting) That's the only time I can recall any out and out harassment or anything lik that.

Q. As a matter of fact, your complaint doesn't

JUDGE KOUTRAS: No. His question was from the time you fired -- I mean from the time you called MSHA until the time you were fired, your complaint doesn't say anything about the needling, the purported needling, that Mr. Feathers subjected you to.

THE WITNESS: No, there's no real -- I couldn't really peg anything down to it.

BY MR. REILLY:

Q. There wasn't anything he said to you that was actually directed to any of the events that occurred with MSHA?

A. Oh, no, not directly, no.

Q. He never criticized you or chastized you in any way, did he?

A. Except for that one time -- well, twice.

Q. You have already indicated except for the time when you just told him that you called MSHA, right?

A. Right; and he got mad, and he got mad the time I wouldn't go back under that second half of the ceiling that fell.

Q. Other than that, there was never any comment by anybody at the quarry to you about having called MSHA, was there?

A. Not directly, no.

Q. Not even indirectly, was there?

A. That's debatable.

JUDGE KOUTRAS: Was there or wasn't there, Mr. Henderson?

Q. What was the overtime you worked, if you --

A. Oh, I don't know. I was putting anywhere from 55 to 60 hours a week in.

Q. We are only talking about a one-week period here, Mr. Henderson; how many extra hours did the quarry make you work because you called MSHA?

A. Well, I can't prove that.

JUDGE KOUTRAS: Hold it, counsel. Do you like to work overtime?

THE WITNESS: When I can, yes, sometimes.

JUDGE KOUTRAS: Did you ever refuse to work overtime?

THE WITNESS: No, I didn't.

JUDGE KOUTRAS: Did they ever order you to work overtime?

THE WITNESS: Sometimes, yes, I had to.

JUDGE KOUTRAS: I mean during this week.

THE WITNESS: I had to.

JUDGE KOUTRAS: I get the impression you're trying to convince me they punished you by making you work overtime, is that a fact?

THE WITNESS: I had to. I had to work overtime because I was the only powder man, and I had to get the rock down on the floor. I couldn't say no. They would say, "Hit the road. We will get somebody else."

JUDGE KOUTRAS: You got paid for it, didn't you?

THE WITNESS: Right.

THE WITNESS: Well, I can't say that that was a punishment, no. I think some of it was.

JUDGE KOUTRAS: Why was some of it?

THE WITNESS: I don't know.

JUDGE KOUTRAS: What leads you to conclude that part of the requirement you work overtime was in punishment?

THE WITNESS: Well, it was not only overtime, it was subtle things that were going on.

JUDGE KOUTRAS: All right, Mr. Reilly.

BY MR. REILLY:

Q. What were the other subtle things, Mr. Henderson, can you name one?

A. No.

In response to question from the bench concerning his safety concerns, Mr. Henderson testified as follows (Tr. 95-100):

JUDGE KOUTRAS: All right, Mr. Henderson. Let me just ask you a couple of questions now. At the time when that half a header fell as you were pulling back, it's my understanding you went back and checked that area with a bar and found that maybe one of the corners may have been loose but it was all tight, it was tight, correct?

THE WITNESS: After one half of it fell?

JUDGE KOUTRAS: Right.

THE WITNESS: Yes. We went up in the bucket, I pried on it a little bit. It would wiggle a little bit but it seemed tight.

JUDGE KOUTRAS: But that is not the area where you

THE WITNESS: Right.

JUDGE KOUTRAS: And that caused you some problem, right?

THE WITNESS: Right.

JUDGE KOUTRAS: You reported that?

THE WITNESS: Right.

JUDGE KOUTRAS: Then Mr. Feathers gave you a pry bar?

THE WITNESS: Right.

JUDGE KOUTRAS: And you went back, and he came back up there a couple hours later and observed it, is that correct?

THE WITNESS: Yes. He was with me.

JUDGE KOUTRAS: He was with you. You tested it with a pry bar?

THE WITNESS: I went up with it, stuck it back up in there in that corner, and it wouldn't budge.

JUDGE KOUTRAS: Now, at that point in time, did you make a decision that that header that was remaining that you went up and tested was unsafe?

THE WITNESS: Well, I was taking a chance, really.

JUDGE KOUTRAS: Forget that. Answer my question. If you tested it with a bar and found that it was sound, then what else, what other alternative did you have?

THE WITNESS: Well, I am not going to say it was sound.

to finish the job and get out from underneath it, O.K.?

JUDGE KOUTRAS: Why didn't you decide that it was unsafe and tell Mr. Feathers that you were not goi to finish the second half of the shot?

THE WITNESS: I don't know. I felt under pressure at the time.

JUDGE KOUTRAS: You felt under pressure?

THE WITNESS: Right.

JUDGE KOUTRAS: And you went ahead and shot it dow

THE WITNESS: I already had half of it loaded. I felt I would go ahead. I was more or less taking a chance.

JUDGE KOUTRAS: You were taking a chance even thou your pry bar test indicated that it was sound?

THE WITNESS: Right.

JUDGE KOUTRAS: Now, the next day is when you call the MSHA people?

THE WITNESS: Right.

JUDGE KOUTRAS: All right, but the next day when you reported to work, you went to another location in the mine, correct?

THE WITNESS: Yes.

JUDGE KOUTRAS: And you found a ceiling?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you test the ceiling?

THE WITNESS: Yes.

THE WITNESS: With the crowbar.

JUDGE KOUTRAS: With the crowbar that you wtill had from the day before?

THE WITNESS: I believe it was the same one.

JUDGE KOUTRAS: All right, and you pecked around, and what did you find?

THE WITNESS: It seemed tight.

JUDGE KOUTRAS: It seemed tight?

THE WITNESS: Right.

JUDGE KOUTRAS: Why didn't you go ahead and load that shot?

THE WITNESS: Well, because the other one seemed tight, too, and you can't tell when these things are going to fall.

JUDGE KOUTRAS: It could fall today, it could fall tomorrow, right?

THE WITNESS: Right.

JUDGE KOUTRAS: And what means do you have for determining whether the area is safe before you go in there?

THE WITNESS: You don't.

JUDGE KOUTRAS: You just told me. What's the normal procedure for testing for soundness of a ceiling or a roof in that situation?

THE WITNESS: The only way I know is to test it with a bar.

JUDGE KOUTRAS: All right.

JUDGE KOUTRAS: Are you suggesting that a roof area that's tested with a bar and appears to be sound should be taken down anyway?

THE WITNESS: Yes, oh, yes.

JUDGE KOUTRAS: To make it 100 per cent safe?

THE WITNESS: Yes, absolutely.

JUDGE KOUTRAS: Is that the way it's normally done?

THE WITNESS: It should be.

JUDGE KOUTRAS: Why do you take something down if you sound it and find it is sound?

THE WITNESS: Who wants to mess around with somebody's life?

JUDGE KOUTRAS: Who wants to mess around underground in a mine to begin with? I'm not trying to be facetious, but I'm trying to understand it here. Were there any citations issued in this case to the mine operator for failing to sound the roof?

THE WITNESS: I don't believe so, no.

Mr. Henderson testified that prior to November 1982, he loaded probably 50 to 100 shots, but that he did not always t the ceiling "because I didn't always have time. It es time and I was busy. It's a heck of a schedule I was on" . 101). Mr. Henderson indicated that the responsibility checking the ceiling is his as well as the superintendent's . 102). When asked what he would do if he checked the f and found that it was not safe, he replied (Tr. 103-105):

JUDGE KOUTRAS: What would you do if you found it was not sound?

THE WITNESS: Sometimes, regretta
go under and do it anyway

have gotten crushed under there, it would have been my fault anyway.

JUDGE KOUTRAS: You wouldn't be here to complain, would you?

THE WITNESS: Yes.

JUDGE KOUTRAS: Isn't that true -- what I'm trying to understand is to what degree do you believe that the mine operator has to go to make an area absolutely fail-safe under all conditions.

THE WITNESS: He should buy a scaling machine and scale it down, make it safe.

JUDGE KOUTRAS: How about building a net or putting a canopy?

THE WITNESS: That wouldn't do any good with 10 tons of rock. It would smash it flat.

JUDGE KOUTRAS: Is there anything in the regulations -- now, you mentioned the federal standards. What is your understanding of what these federal laws require as far as testing and scaling?

THE WITNESS: All I know is what the mine inspectors showed me when they came out that day.

JUDGE KOUTRAS: What did they show you?

THE WITNESS: They showed me a section in there -- I can't remember the section -- like I said, it was my responsibility, along with the foreman or the superintendent, to make sure it was a safe working place.

JUDGE KOUTRAS: All right. Let's assume the section foreman and the mine superintendent determined that it was a safe working place?

header.

JUDGE KOUTRAS: How about the second fall where you sounded with the bar and found it sound?

THE WITNESS: You are talking about the second half of the room that fell?

JUDGE KOUTRAS: Right.

THE WITNESS: I don't know if it was tested or not.

JUDGE KOUTRAS: And then the next day, you found the ceiling that you also said was sound, but you didn't want to go under it?

THE WITNESS: I thought it was. I wouldn't want to take a chance the next day.

JUDGE KOUTRAS: And what did you want the mine operator to do?

THE WITNESS: Scale it down.

When asked to clarify his prior statement in his complaint MSHA that Mr. Feathers attempted to scale down the ceiling, Henderson stated as follows (Tr. 111-112):

BY JUDGE KOUTRAS:

Q. Part of your statement, you said that after you refused to go under the ceiling and after you had this conversation -- or at least wanted Mr. Feathers to look at it -- you said something to the effect in your statement -- and I am quoting: "So the next day he did make an attempt to scale the ceiling, and I told him I appreciated it."

Can you elaborate on that? You seem to indicate in your original statement that Mr. Feathers at some point in time made an attempt to scale the ceiling and you had told him you appreciated it.

Q. Is that your statement there?

A. Yes. This has been so long ago, all this --

Q. (Interrupting) Mr. Henderson, now wait a minute.

A. I'm not denying he did, O.K.? I am trying to remember all this stuff as it comes up, but it is hard to remember, it really is. If I made it there, then he probably did try to scale it down.

* * * *

Q. You may not be able to answer this, but which ceiling were you referring to?

A. I guess it was the one that I refused to go under. I told you all it only had one shot taken out of it.

Steven H. Folsom, testified that he is employed by the espondent as a maintenance mechanic. He testified as to the ncident concerning the low air pressure on Mr. Henderson's ehicle, and he confirmed that the tire looked flat and that e advised Mr. Henderson that he would look at it. However, efore he could take care of the problem, Mr. Henderson left ne area with the truck, and he observed him later in the shift n a conversation with Mr. Feathers about the tire, but did ot hear what transpired (Tr. 113-117).

Mr. Folsom had no personal knowledge of any other employee ctually being fired because of "negligence of equipment," lthough he was aware of the fact that other employees had oused equipment which required him to repair it (Tr. 117). He ad no personal knowledge that the tire which Mr. Henderson rove on actually caused any damage (Tr. 118).

On cross-examination, Mr. Folsom confirmed that a tire n a compressor truck in the past had been ruined by someone riving it with low air pressure, but could not state whether

tire had to be installed to replace the damaged one (Tr. 119
He confirmed that he spoke with Mr. Henderson after he obser
him speaking with Mr. Feathers, and that Mr. Henderson told
him that he had been fired. Mr. Henderson was upset, but he
had no other detailed conversation with him over the inciden
(Tr. 119). He confirmed that he had previously put air in
compressor tires in the shop, and that he had previously per
this service for Mr. Henderson in the past (Tr. 121).

Terry Acock, testified that at the time Mr. Henderson
was discharged he was employed at the quarry as a driller.
He testified as to an accident which he (Acock) had with a
truck which he had been driving when it collided with anothe
vehicle, and that Mr. Feathers accused him and the other man
driving too fast. He was not fired over the incident, and
knows of no one else who was fired for not taking care of
equipment or for damaging equipment. However, he confirmed
that he was discharged by the respondent, but that the reaso
for the discharge was not related to the maintenance of equi
(Tr. 121-123).

On cross-examination, Mr. Acock confirmed that he did
not intentionally run into the truck in question and that it
was an "accident." He did not curse Mr. Feathers, nor did
he argue with him (Tr. 124).

William E. Feathers, quarry superintendent, testified a
to his background and experience. He testified that Mr. Hen
said nothing to him about any rock fall which he may have
experienced in October 1982, and he explained the procedures
followed at the mine to scale down any rock which may remain
after a shot (Tr. 128-134).

Mr. Feathers stated that sometime between November 16 a
20, 1982, Mr. Henderson came to him on a Thursday and showed
him a rock which he threw at his feet and stated "You see th
rock? That could kill a person." Mr. Feathers asked him
to explain, and Mr. Henderson told him that the rock had
fallen from a ceiling where he was working, and that he was
not going back into the mine to work (Tr. 135). Mr. Henders
then explained to him that he called MSHA, and when Mr: Feat
inquired as to why he had not first brought the matter to

The next day was a Friday, and since Mr. Feathers was not at work, he did not see Mr. Henderson again until the follow Tuesday (Tr. 139).

Mr. Feathers stated that when he next spoke with Mr. He on the Tuesday following the rock fall incident, Mr. Stanley had given him a seven-foot bar to use in scaling the ceiling and that Mr. Henderson had it in his truck. After examining the ceiling that Tuesday, Mr. Feathers found that it was "tight" and found nothing that he believed to be unsafe (Tr. Later that week, Mr. Henderson told him that he had refused to "load a room," and when asked whether he had checked the ceiling, Mr. Henderson replied "no," and Mr. Feathers commen "What do you think we bought that bar for you, just to haul around and look at? We bought it for you to use." Mr. Feat stated that he then went back and checked the room that Mr. Henderson was complaining about, but it was not the same room that he had complained about on the previous Thursday. He found that it was "tight" and found nothing unsafe (Tr. 141). Mr. Feathers explained further as follows (Tr. 142-143):

> JUDGE KOUTRAS: Excuse me just a second now for interrupting your narrative, but was that the same ceiling that he had refused to go under?
>
> THE WITNESS: No, no, no, sir.
>
> JUDGE KOUTRAS: This was another location?
>
> THE WITNESS: Yes. This was the whole mine in general that he told me to go up, and there was one particular area over there in the east wing that he wanted me to try and knock down, and so I went over and tried scaling it; but while I was up there, I went around and checked all of them and tried knocking down all the loose rock that I possibly could, and Louis came -- I though it was a good gesture -- he came; and after he seen me doing it, he said, "I appreciate you doing it," and I said, "That is what we want to do," to try to make the place safe to

his complaint where he was you did make an attempt to scale the ceiling and he told you he appreciated it.

A. I imagine.

Q. That's the one he is referring to?

A. Yes.

Mr. Feathers testified as to the incident which occurred the morning of November 26, with respect to Mr. Henderson's .ving his truck with the air in the compressor truck tire low. indicated that this was not the first time this had happened, l that on a prior occasion Mr. Henderson had ruined a tire driving on it without air, and that he (Feathers) had rned him about this practice (Tr. 144-145). Mr. Feathers ated that when he discussed the matter with Mr. Henderson November 26, Mr. Henderson swore at him, then Mr. Feathers ld him that he was fired. Mr. Feathers conceded that he s angry and that he told Mr. Henderson "you're fired because are going to cause me to do something we both might be rry of" (Tr. 145). Mr. Feathers denied grabbing, touching, attempting to swing at Mr. Henderson, and he stated that fired Mr. Henderson because he swore at him. After he ld him that he was fired, Mr. Henderson left the area (Tr. 146

Mr. Feathers stated that after firing Mr. Henderson, he countered Mr. Stanley at the entrance of the mine and informed what he had done. Mr. Stanley informed him that he wanted talk the matter over," and they went to the mine office speak with Mr. Henderson. The three of them then sat a car outside the office to discuss the matter further, l Mr. Stanley was attempting to reconcile the matter. vever, Mr. Henderson began criticizing Mr. Feathers' work l abilities as a supervisor. At that point, Mr. Feathers mmented that "there was no way" he and Mr. Henderson uld continue to work together and still have the cooperation eded to do the work (Tr. 148), and he described what happened xt as follows (Tr. 149-150):

and his own personal feelings that we could reconcile this difference, and I wanted to hear his opinion is because the reason why I wasn't saying anything. I knew Louis is -- well, it may be said maybe nobody really knows Louis -- I thought that I did and I had a working relationship between him, and he did -- and as far as powdering, he was a good powderman. I never had to get onto him for speed or anything, and we did maintain, I thought, a fairly decent working relationship, and I wasn't in no way looking forward to firing him and going out and finding a new powderman and bringing him in and spending 40 hours retraining somebody to take his job. That's nothing to look forward to because there is --

Q. (Interrupting) Did Mr. Henderson become enraged in the car?

A. Yes.

Q. And did Ron say, "That's it. You're out?"

A. Yes.

Mr. Feathers testified as to the incident concerning a
ck accident involving Mr. Acock, and he confirmed that
Acock was not fired, did not swear at him when he discussed
incident with him, and he confirmed that Mr. Acock did
intentionally wreck the truck, and in fact, apologized
the incident (Tr. 152).

On cross-examination, Mr. Feathers confirmed that during
cleanup procedures after a shot is fired, the loader
rator is protected by an overhead canopy on his vehicle
he goes in to scale the area, and that his risk would
less than that of a powderman (Tr. 156). When asked
ther he would have preferred that Mr. Henderson sit idly
while awaiting someone to air up the tire on the compressor,
Feathers answered that Mr. Henderson could have left
compressor and gone ahead with his work without "endangering
tire" (Tr. 157). Mr. Feathers again denied provoking
Henderson, or that he ever threatened or cursed him (Tr. 158)

eight years. He confirmed that he works at the quarry on a daily basis, and he identified the quarry superintedent as Bill Feathers. Mr. Stanley confirmed that Mr. Henderson worked for him as a powderman, and he confirmed how rocks are scaled and the procedures followed by the loader operato after a shot is fired (Tr. 166-168).

Mr. Stanley confirmed that he first learned of any problems with Mr. Henderson on November 18, and that Mr. Hen did not inform him of any prior problems which he may have had in October. He described his first encounter with Mr. Henderson as follows (Tr. 169):

> A. It's foggy, but to the best of my knowledge, we were loading an outside shot, and we needed Louis's caps to load it, and so I was up preparing the holes to load them. Louis came down and we had already started a few holes before Louis had mentioned -- he said, "You know, some ceiling fell up there," and I said, "I don't know." He said, "Well, it did and it just scared the hell out of me." I said, "O.K., let's finish this shot, and we will get up there and look at it. Don't go in or anything if you don't think it's safe, obviously," and we went ahead and finished the shot, and I think we shot it -- I might have went somewhere -- in the meantime, Louis had told Bill about it.

Mr. Stanley stated that after finishing the shot in question, he went to the area where Mr. Henderson had indica had previously fallen, and he found that approximately half of a ten-foot ceiling had fallen. After examining the area, he (Stanley) and Mr. Feathers, considered that it was safe, and as far as he knew Mr. Henderson had not called MSHA that day about this prior fall (Tr. 170). The next day, Mr. Henderson informed him that he had called MSHA, and Mr. Stanley stated that he told Mr. Henderson that he though this was a "great idea" because of ceilings which had hung after six or eight months. Mr. Stanley stated further that he personally called an MSHA inspector to send some inspecto to the mine to check the mine ceilings because he did not want Mr. Henderson to work in areas which had not bee inspec

him or Mr. Feathers about it (Tr. 173). After the aforesaid incident. Mr. Stanley had no further contacts with Mr. Hendersc concerning any work refusals, nor did he have any conversations with him about the condition of the mine ceiling until the day of his discharge (Tr. 173). With regard to what transpired at the time of the discharge, Mr. Stanley stated as follows (Tr. 173-174):

> A. I don't know how I knew he was fired. I was just driving through the mine, and Louis -- I think he was in the shed changing clothes or putting in his timecard -- and I asked, "What is going on?" and he said, "I got fired." He was upset but not vocally upset, and I said, "Oh, hell. Why don't you get in the car, go over to the office, get a pickup, go to the office. I will get Bill and we will come over to the office and talk. So I had to run Bill down; and I asked Bill what happened, and he said, "Well, he just cussed me out, drove with a flat tire, and I fired him," and I said, "Well, let's go over and talk to him," and I said, "If we go over and talk to him and we get this straightened out, would you hire him back?", and Bill said "Yes," which is hard to do because I stand behind Bill. That's his responsibility. So I said, "O.K., so let's at least go over and try to talk it out." Bill got in the car. Louis got in the car in front of the office. Bill was kind of being quiet, and it's real hard to start a conversation, and Louis really got upset as far as I'm concerned, just went totally -- he told one specific thing I remember definitely. He said, "Bill doesn't care how many men are killed out here as long as we get production." Well, that pissed me off because I know Bill cares about somebody's life, but he said he doesn't care if a man gets killed every day as long as we have production, and I said, "Louis, I know better than that," and as the conversation went on and on, Louis got hotter than hell, and I started getting made, and I said, "O.K., that's all. Forget

and that Mr. Feathers said nothing about Mr. Henderson being "a troublemaker." As a matter of fact, Mr. Henderson stated that he had no problems with Mr. Henderson in the past and that he heard through hearsay that Mr. Feathers had in the past talked him out of quitting his job because others were "needling" him about working overtime. Mr. Stanley stated further that he never "punished" Mr. Henderson by requiring him to work extra hours, and he indicated that Mr. Henderson liked extra hours and "worked all the hours he could get" (Tr. 175).

On cross-examination, Mr. Stanley denied that Mr. Hende told him that Mr. Feathers "grabbed him" or "started to hit him" (Tr. 176). He confirmed that Mr. Henderson worked at the quarry for about a year, and that matter concerning Mr. Feathers' talking him out of quitting occurred six to eight months into his employment (Tr. 176).

In response to bench questions, Mr. Stanley confirmed that he went to the area where the ceiling fell with the MSHA inspectors after Mr. Henderson called them, and that the area had already been shot and was "gone" (Tr. 177). He confirmed that the inspectors looked at the ceiling condi of the entire mine in the areas where the ceiling is left after the shots are fired, and they inspected approximately 12 headings. Mr. Stanley suspected that Mr. Henderson was concerned generally about all of these ceiling conditions, and he stated further as follows (Tr. 179-181):

> JUDGE KOUTRAS: All right. Now, what did the inspectors have to say about the conditions that they viewed, the general --
>
> THE WITNESS: They said if it hangs back 10 foot, it's pretty bad even though you can get a bucket up there and you can lift. I have seen them lift the whole machine off the ground trying to pull it down; and there's two other things we can do. We can drill our top holes a little closer to the ceiling, and then it will break back. On half the shots, you may get a

THE WITNESS: I don't know his frame of mind at the time. I'm sure that day he was nervous. He didn't want to go anywhere in the mine.

JUDGE KOUTRAS: If half a header fell, I can understand his being a little nervous about that. You probably should have given him the rest of the day off or something, but what I am trying to understand is the facts of this case. Now, let me ask you this. At that point in time, was your mine operating under a particular written plan for the scaling of walls, or do you simply refer to the mandatory standards?

THE WITNESS: The standards, but our own standards.

JUDGE KOUTRAS: Your own procedures as testified?

THE WITNESS: The man that is on the loader has beein in limestone mines for 40 years, and he is kind of an old hand on ceilings. He is the first one in the room; and when he says it is unsafe or it needs picking, we kind of use him for a guide. I have been in mines for 20 years. He is kind of the old salt of the mines, and then the driller has been there a long time; and then after those two get through with it, we consider it safe -- I do unless someone comes around and tells us.

JUDGE KOUTRAS: Who is the person responsible for making the examination required under the mandatory standard?

THE WITNESS: Bill, Mr. Feathers.

JUDGE KOUTRAS: What is your track record, have you ever had any fatalities or accidents at that mine involving roof falls?

THE WITNESS: No fatalities. We had a rock fall. A guy skinned his arm one time off to the side.

JUDGE KOUTRAS: Did any citations or violations result of MSHA's, Mr. McGee's, visit to your mine?

THE WITNESS: No, as far as I know, no.

When called in rebuttal, Mr. Henderson stated that had a good working relationship with Mr. Stanley. He also dicated that he had a similar good relationship with Mr. Feath ntil the time I turned him in to MSHA" (Tr. 136). When asked elaborate, he explained as follows (Tr. 126-127):

Q. Now, what do you mean, real good, did you get along well?

A. Got along with him just fine as far as -- I don't know -- no hassles or anything like that, no arguments really.

Q. And what change did you notice in your relationship with Mr. Feathers after you made your complaint?

A. Just some sarcastic -- short with me all the time, stuff like that.

Q. That's what you were describing earlier about the incident?

A. Right.

MR. NELSON: Thank you.

CROSS-EXAMINATION

BY MR. REILLY:

Q. Can you recall what sarcasism Mr. Feathers expressed to you on any given occasion between November 18 and November 26 of 1982?

A. Not any outright hostility or anything like that.

the time you turned him in to MSHA. Now, when you called the MSHA inspectors, you just wanted them to come out to examine the workplace, right?

THE WITNESS: Right.

JUDGE KOUTRAS: How did that translate to turning him in, did you mean by that since he was in charg of the mine as the superintendent there, that he was responsible?

THE WITNESS: Well, I didn't mean it to sound like I was turning him in. I just wanted somebody to come out and look at the mine.

JUDGE KOUTRAS: When you called the MSHA people, did you mention Mr. Feathers' name?

THE WITNESS: I don't think I did.

JUDGE KOUTRAS: You just wanted the inspectors to come out to look at the scene?

THE WITNESS: Right.

On the evening prior to the scheduled start of the hearing, t was called to my attention that complainant's counsel had requested" the appearance of two MSHA inspectors for testimony t the hearing. Although no subpoenas had issued for their ppearance, they appeared voluntarily at the hearing, and were ccompanied by a representative from the Labor Department's ansas City Regional Solicitor's Office (Tr. 110). Since this s a "private" discrimination matter, the Solicitor's represen- ative was prepared to interpose an objection to the service of he subpoenas on the inspectors in question in accordance with he applicable Departmental policy.

By agreement and stipulation of the parties, the inspectors ere not called to testify and they were excused (Tr. 110). omplainant's counsel stated the following terms of the stipu- ation in lieu of the inspectors' testimony (Tr. 108-109):

six to eight feet from the face. They considered that any problem that had existed had been solved by that scaling down. However, they did make recommendations that the seams routinely be scaled down after the blast or that a protective shield of some kind be constructed for the vehicle and for Mr. Henderson's safety.

They would also testify that they did consider this particular seam to be potentially dangerous after blasting although they didn't observe it other than in the scaled-down condition it was in when they arrived.

They would further testify that it is the duty of the miner to inspect and that if the miner, after inspecting considers a condition to be hazardous or dangerous, that it is then the responsibility of the owners or supervisors to see that the condition is corrected before the miner goes underneath it, and I think we can get the citations for that from the Federal Register.

Respondent's counsel pointed out part of the stipulation should include the fact that when the MSHA inspector's came to mine in response to Mr. Henderson's request, they issued no citations for violations of any mandatory safety or health standards, and found no condition which was in any way hazardous to Mr. Henderson's health (Tr. 110).

Findings and Conclusions

The complainant alleges that his discharge was discriminatory in that it was in retaliation for his complaining to MSHA inspectors about certain mine conditions which he believed were hazardous. In his posthearing brief, complainant's counsel states that he is also claiming that Mr. Henderson's discharge was in retaliation for exercising his right to reasonably refuse work under conditions he considers "eminently dangerous." Further, although Mr. Henderson's original complaint made no mention of any harassment by mine management, he raised this issue during the course of the hearing. Finally, Mr. Henderson argues that prior to his discharge no one else was terminated

I find nothing in the record to support Mr. Henderson's assertion that Mr. Feathers harassed or intimidated him because of his exercise of any protected safety rights. Mr. Henderson could cite no specific instances of hostility or intimidation, and he simply concluded that Mr. Feathers accused him of "makin waves" and "causing trouble."

Mr. Henderson asserted that Mr. Feathers retaliated agains him for complaining to MSHA, and he inferred that this took the form of requiring him to work overtime. However, Mr. Henderson could not substantiate this claim, and I conclude and find that the record here does not support any such conclusions.

I conclude and find that any "hostility" shown by Mr. Feathers towards Mr. Henderson resulted from their encounte over the low air pressure in the compressor tire, as well as their obvious dislike for each other stemming from that inciden as well as Mr. Henderson's "opinions" concerning Mr. Feathers' supervisory talents as related to Mr. Stanley during their conversation after the discharge. After viewing the witnesses during the hearing, I find Mr. Feathers' account of the inciden over the tire to be credible and believable, and I believe that he was provoked by Mr. Henderson's conduct, and reacted accordingly. Further, I take note of the fact that Mr. Henderson is much younger and physically larger than Mr. Feathers, and that after considering their testimony and viewing them on the stand I simply do not believe Mr. Henderson's assertion that Mr. Feathers was the aggressor during their encounter over the tire incident.

With regard to any intimidation or harassment against Mr. Henderson by the quarry operator (Stanley), for safety reasons, there is absolutely no evidence to suggest this was the case. To the contrary, while it is true that Mr. Stanley ultimately discharged Mr. Henderson, the record shows that Mr. Henderson was tolerant and charitable towards Mr. Henderson and even suggested that he and Mr. Feathers attempt to reconcil their differences, and Mr. Stanley attempted to mediate their differences. However, based on Mr. Stanley's testimony, which I find credible and believable, Mr. Henderson became argumentative, and after questioning Mr. Feather's supervisory abilities Mr. Stanley supported Mr. Feather's version as to why he propos to discharged Mr. Henderson.

his truck. The rock did not damage his truck, and he estima
that the last five feet of the seam which was some 12 feet o
the face, had fallen.

Mr. Henderson testified that the second rock fall occur
sometime between November 12 to 15, 1982. After loading on
half of the heading, he withdrew for a distance of 10 yards,
and while preparing to set off the shot some thirty seconds
later, the roof which he had loaded fell.

Mr. Henderson conceded that at no time did anyone ever
direct or order him to work under any conditions which he
believed were unsafe. As a matter of fact, when the first
fall occurred, Mr. Henderson admitted that he did not tell
Mr. Feathers or Mr. Stanley about it. When the second fall
occurred, he testified that he told Mr. Stanley about it, an
Mr. Stanley advised him not to go under any roof seams which
he believed were dangerous. Mr. Henderson also indicated th
Mr. Feathers came to the area to look it over, and that
Mr. Feathers provided him with a bar to test the roof. He a
indicated that Mr. Feathers instructed him that he was to te
the roof with the bar from that point on. Mr. Henderson als
confirmed that after both he and Mr. Feathers tested the sec
half of the shot area and found it to be safe, Mr. Henderson
loaded it, shot it down, and then went home.

Mr. Henderson stated that the day after the second fall
occurred, he returned to work but refused to go under anothe
heading because, upon visual observation, he did not believe
that any attempts had been made to scale the roof. He teste
it himself with a pry bar, and after "pecking around a bit"
with the bar from a bucket, he found that the roof was tight
but he still refused to go under it because he was afraid th
it might fall. At that point in time, Mr. Henderson claims
Mr. Feathers became "irate." However, Mr. Henderson concede
that Mr. Feathers did not instruct him to go under the roof,
and Mr. Henderson claims he then telephoned MSHA Inspector M
the afternoon or evening after he returned to work to advise
him about his refusal to go under the roof and to ask him to
send an inspector to the mine to "look at the situation."

Mr. Henderson's counsel stipulated that after the MSH inspectors came to the mine and inspected the area which c cerned Mr. Henderson, the inspectors were of the opinion t any concern on Mr. Henderson's part had been resolved by t scaling of the area. As a matter of fact, the stipulation suggests that at the time the inspectors looked at the are which concerned Mr. Henderson, the area had been scaled do and the inspectors had no basis for making any determinati to whether the area was in fact hazardous. This probably explains why no citations or violations were ever issued b inspectors.

When asked about his prior statement in his complaint Mr. Feathers attempted to scale down the ceiling which he complained about, Mr. Henderson at first claimed that he c not remember making such a statement. He then acknowledge he did make the statement, and he also admitted that the c in question was the same one which he initially refused to under.

Mr. Henderson conceded that when he first informed Mr. Stanley about his safety concern with respect to his w in any areas of the mine which he believed were not safe, Mr. Stanley advised him not to work in any such areas. Mr. Henderson also confirmed that Mr. Stanley told him tha would never question his decision in this regard, and even offered to go with him to inspect any areas of the mine wh he (Henderson) believed were hazardous.

With regard to Mr. Feathers, Mr. Henderson conceded t Mr. Feathers agreed to inspect the areas which he (Henders believed were hazardous, and both Mr. Feathers and Mr. Sta inspected these areas, tested them with a bar, and found t they were "tight" and safe. As a matter of fact, Mr. Hend himself tested the areas with a bar and found that they we tight. It would appear to me that Mr. Henderson's concern the stability of the ceiling stemmed from the fact that si part of a ceiling fell near his work area in the past, he concerned that it might fall again. However, on the facts this case, I conclude and find that this concern on his pa was unreasonable.

e did not have time. He acknowledged that testing the roof was art of his responsibility, and he admitted that if he tested he roof and found it not to be sound he would still take a hance and go under it.

Refusal to perform work is protected under section 105(c)(1 f it results from a good faith belief that to go ahead with the ssigned work would expose the miner to a safety hazard, and if he belief is a reasonable one. Secretary of Labor, ex rel. asula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 October 1980), rev'd on other grounds, sub nom Consolidation oal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary o abor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 302 BNA MSHC 1213 (April 1981); Bradley v. Belva Coal Co., 4 FMSHR 82 (June 1982). Further, the reason for the work refusal must e communicated to the mine operator. Secretary of Labor ex rel unmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 982).

On the facts of the instant case, there is absolutely no redible evidence to even suggest that Mr. Henderson's discharge as in any way connected with his alleged refusal to perform ork which he believed was hazardous. Prior to the hearing in his case, Mr. Henderson never directly asserted that his "work efusal" motivated his discharge, and his counsel raised this ssue during and after the hearing. Even if I were to conclude hat Mr. Henderson's claim in this regard was a viable one, I ould still reject it.

While it is true that Mr. Henderson's refusal to work under onditions which he believes to be hazardous is protected ctivity, the refusal must be reasonable. In this case, it ppears to me that Mr. Henderson wanted mine management to uarantee that a mined-out roof would never fall, regardless of he area of the mine where Mr. Henderson happened to be at any iven time. I find Mr. Henderson's position in this regard to e unreasonable, and for the reasons which follow, I conclude hat the respondent promptly addressed Mr. Henderson's safety oncerns, and did all that was reasonable to accomodate him.

Based on the credible testimony and evidence adduced in his case, Mr. Henderson's perceived safety concerns were

ocassions, often took chances in working under poor conditions which were less than desirable, and he never complained or brought these conditions to the attention of his supervisors. Under the circumstances, Mr. Henderson's assertions that his discharge was out of retaliation for his refusal to work under dangerous conditions are without foundation, and they are rejected. I conclude and find that on the facts of this case, Mr. Henderson's asserted refusal to work for safety reasons wa unreasonable, and therefore not protected activity.

Mr. Henderson's Safety Complaints and the Alleged Retaliation for those Complaints

It is clear that a miner has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against an employee; Secretary of Labor ex re Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Mars 663 F.2d 1211 (3rd Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981) In order to establish a prima facie case a miner must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in a part by the protected activity. Further, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

As indicated above, Mr. Henderson's complaints about cert working conditions which he believed were hazardous were promptly and properly addressed by mine management. Further, under the facts of this case, I cannot conclude or find that Mr. Henderson's complaints or fears of perceived hazards were reasonable. While it is true that there were two rock falls and about his work area, he failed to bring the first one to anyone's attention until well after the fact. As for the seco one, once called to mine management's attention, the problems were immediately addressed.

any suggestion that Mr. Feathers or Mr. Stanley retaliated against Mr. Henderson for summoning the inspectors, I find absolutely no evidence of record, either direct, or indirect, to support any such conclusion or finding. Accordingly, Mr. Henderson's assertions in this regard are rejected.

Alleged Disparate Treatment

At page seven of his posthearing brief, Mr. Henderson's counsel states that "no one was previously terminated from the mine for misuse of equipment, despite the fact that the record abounds with evidence of misuse of equipment by other employee However, counsel fails to cite any such evidence as part of hi arguments, nor has he cited any references to the record to support his conclusions. Counsel simply asserts that "the attitude of Mr. Feathers regarding Mr. Henderson's complaint, Mr. Feathers' attitude at the time of termination, and the relationship in time between the refusal to work and terminati establish complainant's burden of proof that he was discharged in violation of 30 U.S.C. § 815(c)(1)."

Mr. Henderson alluded to an accident involving a Mr. Acoc in which he struck a dump truck with his pick-up truck while driving too fast, and he indicated that Mr. Acock was not terminated (Tr. 57). Mr. Henderson also mentioned that he had observed trucks "hot-rodded around," and indicated that he was not aware of anyone being fired for misuse of equipment (Tr. 5 However, Mr. Henderson conceded that he has heard supervisors speak to other employees for this conduct, and he admitted tha he had previously been verbally warned by Mr. Feathers about driving too fast (Tr. 59).

Although mechanic Steve Folsom testified that in the 5 years he has worked for the respondent few employees have be fired, he did indicate that "most of them quit." However, he did indicate that a truck driver named "Tracy" was dismissed f "tearing up the transmission" (Tr. 117).

Terry Acock, formerly employed by the respondent as a driller, testified about the accident referred to by Mr. Henderson. Mr. Acock indicated that he did not intentiona run into the truck in question, and that it was an "accident."

accident involving Mr. Acock. He stated that Mr. Acock did not intentionally wreck the truck, and that he apologized for the incident and did not curse him or abuse him. Under these circumstances, he did not believe that the facts surrounding the Acock accident were the same as those which prevailed when Mr. Henderson deliberately operated his compressor truck with low tire air pressure (Tr. 152).

Aside from the accident involving Mr. Acock, Mr. Henderson was unable to document any instances of disparate treatment. To the contrary, the record here suggests that at least one employee was discharged for damaging a truck transmission, and that others, including Mr. Henderson, were verbally warned and cautioned by Mr. Feathers about speeding and other such incidents. Given the fact that the respondent's quarry operation is a small, non-union operation, the fact that the respondent has not generally fired many employees is not critical. As confirmed by Mr. Folsom, employees usually quit rather than being fired, and since Mr. Henderson has the burden of proof here, it was incumbent on him to establish any disparat treatment by a preponderance of credible evidence. This he has not done. Accordingly, his arguments in this regard are rejecte

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the complainant here has failed to establish a prima facie case of discriminatio on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief are DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

Kenneth J. Reilly, Esq., Boddington & Brown, Security National Bank Building, Minnesota Avenue at 7th Street, Suite 100, ity, KS 66101 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 83-196
	:	A.C. No. 15-10364-03501-A5A
v.	:	
	:	Preparation Plant
EDDIE HIGGS, d/b/a HIGGS TRUCKING COMPANY, Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Byron W. Terry, Safety Director, Higgs Trucking Company, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case is submitted for decision on a stipulated set of facts and certain exhibits. There is no dispute as to the essential facts. Both parties have filed written arguments on the applicable law. Based on the record including the stipulations and exhibits, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Teddy D. Higgs and James E. Higgs (apparently also known as Eddie Higgs), his brother, were partners in a company known as the Higgs Trucking Company. The Higgs Trucking Company was an independent contractor doing coal haulage for Golden R. Coal Company, Inc. On October 8, 1982, Teddy Higgs was told to drive the company truck to Golden R. Coal Company and haul coal from the mine to the preparation plant. Teddy Higgs did as he was instructed and dumped his load of coal at the preparation plant at about 8:55 a.m. He then moved the truck and raised the truck bed in order to grease the rear universal joint. While lying across the truck frame he apparently contacted the control

Respondent is a small operator. James E. Higgs, presentl a sole proprietor, had a gross income of $36,657 in 1982, and of $28,000 in 1983. His net profit in 1982 was said to be $7,000. Respondent has no history of prior violations.

ISSUES

1. Is Respondent, an independent contractor, subject to the Act?

2. Was the deceased partner a miner under the Act?

3. Is the Partnership liable for a civil penalty for a violation of the Act committed by and affecting one of the partners?

4. If Respondent is subject to the Act and liable for th violation, what is the appropriate penalty?

CONCLUSIONS OF LAW

1. Section 3(b) of the Federal Mine Safety and Health Ac of 1977, 30 U.S.C. § 802(b), defines "operator" to include "an independent contractor performing services or construction at such mine." Section 3(g) defines a "miner" as "any individual working in a coal or other mine." The Act thus clearly covers Respondent's activities in hauling coal for Golden R. Coal Company on October 8, 1982. See Secretary v. Old Ben Coal Company, 1 FMSHRC 1480 (1979); Secretary v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982). Just as clearly, Teddy D. Higgs who was fatally injured on that date was a miner. There fore, I conclude that Respondent was responsible to observe th mandatory safety standards and was properly cited for a viola- tion of 30 C.F.R. § 77.404(c).

2. A civil penalty proceeding under the Mine Act is not analogous to a civil action for wrongful death. The purpose o imposing civil penalties for violations of safety standards is to promote safety in the nation's mines, and penalties are mandated for violations whether or not the mine operator was a fault. Secretary v. Ace Drilling Coal Company, Inc., 2 FMSHRC 790 (1980); Secretary v. Nacco Mining Company, 3 FMSHRC 848

truckers operating on mine sites are not required to have hazard training and are not acquainted with MSHA regulations are irrelevant.

3. Although Respondent argues that the imposition of a penalty "could possibly effect his staying in business," there is no evidence in the record to support this assertion. The violation here was extremely serious since it resulted in a fatal accident. The negligence was very great, but perhaps should not be charged to the operator. The operator is a small operator and has no history of prior violations.

The tragic circumstances of this case make a substantial civil penalty inappropriate, despite the seriousness of the violation. The purpose of assessing penalties is to deter future violations. The deterrent effect of a monetary penalty cannot possibly add to the deterrence which resulted from a brother's fatal accident. See Secretary v. R. F. H. Coal Company, 5 FMSHRC 1863 (Decision Approving Settlement by Judge Steffey 1983).

Therefore, applying the criteria in section 110(i) of the Act to these facts, I conclude that a civil penalty of $21 is appropriate for the violation.

ORDER

Based upon the above findings of fact and conclusions of law, Citation No. 2074514 issued December 17, 1982, to Respondent Higgs Trucking Company is AFFIRMED. Respondent is ordered to pay within 30 days of the date of this decision the sum of $21 as a civil penalty for the violation found herein to have occurred.

James A. Broderick
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Departmen

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 83-225 A.C. No. 15-13881-03502
v.	:	
PYRO MINING COMPANY, Respondent	:	Pyro No. 9 Slope William Station

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

By order of April 20, 1984, I denied the Secretary motion to approve settlement of this matter in the amount of $20.00 and offered to consider an amended motion in the amount of $250.00. On May 4, 1984, the Secretary renewed his motion setting forth that the parties had now agreed to settle the matter at the amount stipulated by the trial judge, namely, $250.

The premises considered, therefore, it is ORDERED that the motion to approve settlement and dismiss be, and hereby is, GRANTED, and the captioned matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 83-40 A.C. No. 34-01241-03501
v.	:	Docket No. CENT 83-51 A.C. No. 34-01241-03502
TURNER BROTHERS, INC., Respondent	:	Muskogee No. 2 Mine
	:	Docket No. CENT 83-52 A.C. No. 34-01357-03503
	:	Welch No. 1 Mine
	:	Docket No. CENT 83-54 A.C. No. 34-01317-03506
	:	Docket No. CENT 83-55 A.C. No. 34-01317-03507
	:	Heavener No. 1 Mine

DECISIONS

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor U.S. Department of Labor, Dallas, Texas, for Petitioner;
Robert J. Petrick, Esq., Muskogee, Oklahoma, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 17 alleged violations of certain mandatory safety and health standards promulgated pursuant to the Act. Respondent

been established by the preponderance of the evidence at the hearings, and (3) whether several of the citations were in fact "significant and substantial" as alleged by the inspector who issued them.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

The citations and allegations of violations in each of these dockets follow below.

CENT 83-40

Section 104(a) Citation No. 2076868, March 21, 1983, cites a violation of 30 CFR 77.410, and the condition or practice cited is as follows:

> The Caterpillar 777 rock haul truck, company no. 258, hauling rock from the 004 pit to the stock pile area would not give an automatic audible warning when put in reverse. The warning device was not in operating condition. Four front end loaders, two dozers, three haul trucks, and four persons on foot were in the area in the pit when this truck was being operated in reverse.

Section 104(a) Citation No. 2076869, March 21, 1983, cites a violation of 30 CFR 77.1605(d), and the condition or practice cited is as follows:

> The Caterpillar 777 rock haul truck, company no. 249, hauling rock from the 004-0 pit to the stock pile area was not provided with an audible warning device (front horn) in operating condition.

with seat belts for the operator to wear. This loader is operated up and down an incline going in and out of the pit where there is a danger of it overturning.

Section 104(a) Citation No. 2076871, March 21, 1983, cites a violation of 30 CFR 77.1109-(c)(1), and the conditio or practice is as follows:

> The D-10 Caterpillar bulldozer, company no. 818, operating at pit 004-0 was not equipped with a portable fire extinguisher.

CENT 83-51

Section 104(a) Citation No. 2007403, May 3, 1983, cites a violation of 30 CFR 71.101, and the condition or practice is as follows:

> A valid respirable dust sample taken by MSHA 4/19/83 from the operator's cab of a Caterpillar D-10 bulldozer operating in pit 001-1 (cassette # 40399373), showed a respirable dust concentration of 1.5 Mg/M^3. This sample was sent to the Pittsburgh Health Technology Center for quartz analysis 4/20/83. The results of this analysis indicates a quartz precent [sic] of 18%. Therefore, the operator was not maintaining the average concentration of respirable dust in the atmosphere during each shift to which each miner at this work position (Designated 001-0, 368) is exposed at or below a concentration of respirable dust computed by dividing the precent [sic] of quartz into the number (10) ten as required by section 71.101, Title 30, CFR.

001-1, cleaning coal was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

2076411. The 510-B, PM Grader operating at Pit 001-0 cleaning coal was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

2076412. The Caterpillar 988-B Front-end loader operating at Pit 001-0 (loading rear dump trucks) was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

Section 104(a) Citation No. 2076409, May 17, 1983, ci
a violation of 30 CFR 77.1605(d), and the condition or pra
is as follows:

The Caterpillar 980-C operating in pit 001-0, cleaning coal was not provided with an audible warning device (horn) in operating condition. No persons on foot in the area at the time this violation was observed.

Section 104(a) Citation No. 2076410, May 17, 1983, ci
a violation of 30 CFR 77.1110, and the condition or practi
is as follows:

The fire extinguisher on the 510-B PM Grader operating at Pit 001-0 cleaning

Section 104(a) Citation No. 2007402, March 15, 1983, cites a violation of 30 CFR 71.100, and the condition or practice is as follows:

> The results of (3) valid respirable dust samples taken by MSHA 3/08, 09, 10/83 from the operator's cab of the Reed SK35 Drill at Pit 001 show the average concentration of respirable dust as 3.7 Mg/M^3. Therefore the operator is not maintaining the average concentration of respirable dust in the atmosphere during each shift to which each miner at this work position (Designated 002-0, 384) is exposed at or below the allowable limit of 2.0 Mg/M^3. The Reed SK35 Drill, serial number 1061193 is one of (2) two drills working at Pit 001 at the time these samples were collected.

The inspector modified the citation on March 23, 198 and the justification for this action states as follows:

> The results of a respirable dust sample collected by MSHA 3/10/83 from designated work position 002-0, 384 and forwarded to Pittsburgh Health Technology Center for quartz analysis show a quartz percent of 33 percent. Therefore, citation number 2007402 issued 3/15/83 is modified to show the respirable dust standard as 0.3 Mg/M^3.

On March 28, 1983, the inspector extended the origin abatement time from March 25, 1983, to April 5, 1983, and the justification for this action states as follows:

> The mine operator removed the Reed SK35 highwall drill, serial # 1061193 (Dwp 002-0, 384) from service and replaced this drill with a Reed SK35, serial # 1061206 that is equipped with an air

> The Heavener Mine No. 1, I.D. # 34-01317, was placed in a "B" nonproducing status April 1, 1983. Therefore, citation # 2007402 is further extended to allow production to resume before respirable dust samples required by section 71.201(d), Title 30 CFR can be collected by the operator.

On April 11, 1983, the inspector modified the original citation as follows:

> Citation Number 2007402 issued 3/15/83 is hereby modified to show the part/ section Title 30 CFR as 71.101 (respirable dust standard when quartz is present).

On May 18, 1983, the inspector issued a section 104(b), order of withdrawal (2007405) affecting the Reed SK35 highwall drill at pit 001, and the condition or practice justifying this order is shown as follows:

> The results of the five (5) respirable dust samples taken by the operator to comply with the requirements of section 71.201(d), Title 30 CFR indicated an average concentration of 1.6 Mg/M^3. Due to ineffective efforts by the operator to control respirable dust in the atmosphere of designated work positions 002-0, 384 at or below the allowable limit of 0.3 Mg/M^3. Citation Number 2007402 is not extended.

On May 18, 1983, the inspector modified the section 104 order, and on June 1, 1983, he terminated it after compliance with the applicable respirable dust standards.

The caterpillar rock truck, Company No. 912 being operated at Pit 001-0 was not provided with an audible warning device (front horn) in operating condition. This truck was hauling top soil and other equipment was being operated in the area. One rock truck, two front-end loaders, and one road grader.

Citation No. 2076970 cites a violation of 30 CFR 77.1 and the condition or practice is as follows:

The 96 caterpillar bulldozer being operated at Pit 001-0 was not provided with a fire extinguisher maintained in a usable and operative condition. The fire extinguisher on this dozer was equipped with a guage that showed the extinguisher to be discharged.

Citation No. 2076971, cites a violation of 30 CFR 77. and the condition or practice is as follows:

The caterpillar 14G road grader being operated on the haul roads at the 001-0 pit was not equipped with an automatic warning device that will give an audible warning when the road grader was put in reverse. The warning device was not in operating condition.

Citation No. 2076972 cites a violation of 30 CFR 77.2 and the condition or practice is as follows:

The valves on two compressed gas cylinders, one oxygen and one acetylene, were not protected by covers. The cylinders were located on a portable welding machine near pit 001-0. Two mechanics were working in this area.

condition that would give an audible warning when the loader was pit in reverse. Three persons were on foot working in the pit where the loader was being operated.

Citation No. 2076978 cites a violation of 30 CFR 77.1 and the condition or practice is as follows:

> The international coal haulage truck operating at pit 001-0 was not equipped with a parking brake in operating condition in that when the parking brake was set on a small incline going into the pit it would not hold the truck.

Testimony and Evidence Adduced by the Parties

CENT 83-40

Citation 2066868, 30 CFR 77.410 (Tr. 12-19).

Inspector Donalee Boatright cited a Caterpillar 777 r truck after he asked the driver to back it up and heard no backup alarm sound. A horn was on the truck, but it was inoperative, and he believed that a wire was loose. The truck was taken out of service, and the device was repaire

Mr. Boatright stated that he issued the citation at 9:30 a.m., and that the shift started at 7:00 a.m. He indicated that the alarm in question could have been worki at the beginning of the shift, and it also could have beer checked at the beginning of the shift. A simple two or th minute test is all that is required to test the alarm, and he conceded that wires can come loose or that normal wear and tear may render them inoperable.

Mr. Boatright described the pit where the truck was at as approximately 140 feet wide. He stated that when th truck is loading rock there are two loaders loading it and the truck back up to where the loaders are positioned for loading. In addition, in another part of the pit "over fr

or less in the same area."

On cross-examination, Inspector Boatright described the parameters of the pit area and ramp where the truck in question would travel, and he described the pit as approximately 100 to 140 wide and 250 feet long (Tr. 23). He stated that the truck was hauling material out of the pit and traveling to a stockpile which encompassed a total trip area of some 2,000 to 2,500 feet (Tr. 24). He described the travel route of the truck and indicated on a sketch (exhibit R-2), where the truck would have traveled. He confirmed that the truck would travel into the pit area, go by the coal stockpile in a forward direction until it reached the face, and would then back into the area where two loaders would be waiting to load (Tr. 27). He also indicated that on the day he issued the citation, there were people on foot in the area where the truck was in reverse, and that they were "cleaning coal and taking coal down there" (Tr. 28).

Mr. Boatright further explained where the truck was operating, as follows (Tr. 29):

> JUDGE KOUTRAS: No, no. Mr. Inspector, I think the point Mr. Petrick is trying to make is that you've indicated on here on the face of your citation is that there were four people on foot, and you've marked this violation as significant and substantial. Now what he's trying to determine is whether or not the people that you've described as being on foot were really exposed to this truck backing over them. In other words, were they in the immediate vicinity of the truck at the time that the truck would normally go into reverse?
>
> THE WITNESS: At the time I saw them, they weren't directly behind the truck, no, sir, but they were in the pit area.

talking about -- the triple seven truck was loading spoil, shale; was it not --

A. Yes, sir.

Q. -- rock? Okay. And the coal that they were working on was cleaned and ready for processing taken out and being cleaned; was it not?

A. They were cleaning and loading it.

Q. Okay. And what was the distance between the time the area where the loaders were loading this triple seven truck and the coal area where they were cleaning?

A. I did not measure that. I did not measure the distance.

Q. Do you have a guess? 100 feet, 200 feet?

A. No, it wasn't. I would say not more than 7,500 feet. But it was all in the pit area right here (indicating).

Q. Okay. But my scenario so far as driving by the coal pad area is that they were always in the forward gear. They did not go into reverse until they got by the coal pad, the coal area.

A. That's probably right.

* * *

Q. (By Mr. Petrick). Now, Mr. Boatright, right before you inspected this truck, did you watch the operation for any length of time?

A. I had probably been an hour and a half or so I guess, I don't know.

pulls in and gets loaded and goes on its way to unload the thing. And then the second one comes in, backs in, gets its load, goes on. The third one backs in, gets loaded, and it goes on. By that time the first one has dumped and comes back, so you're running it in a cycle; is that not correct?

A. Yes, sir, they run in a cycle.

Q. Now in addition to that, in the pit area there is a grader that takes care of the road, there's a water haul truck that takes care of -- taking care of the dust and that type of stuff on the road. Were they in the area? Did you observe them?

A. Seemed like I saw a road grader, but I don't recall the water truck.

Q. Okay. Now also on the coal scene where these four men were working in the area, the most immediate piece of equipment to those four men was a 966 or 980 loader; was it not?

A. I believe they was using a 966 loader cleaning the coal.

Q. And it had a back-up horn, it was running back and forth all over the place right next to those men; wasn't it?

A. It was running back and forth cleaning up coal, yes, sir.

Q. Okay. And it had a back-up horn and the back-up horn was sounding?

A. Yes, sir.

Q. The back-up horns on the two 992's were sounding, weren't they?

violation of a back up horn [illegible]

Q. And what I'm saying is in the immediate proximity the back-up horn is going all the time on one of those pieces of equipment. So, so far as your gravity of being reasonably likely that somebody's going to get run over due to the result of this back-up horn not working, that's not really true. Because there's other back-up horns alerting people all the time in that pit in that area?

A. For the particular piece of equipment that it's on it's alerting, but not for the one that it's not operating on.

Q. Well the two 992's are right next to the triple seven truck, aren't they?

A. When a triple seven truck backs under them they are, yes, sir.

Q. And were the back-up horns different so far as sound is concerned, so that you can tell whether you've got a 992 coming at you or a triple seven truck?

A. I wouldn't say the sound was different.

Citation 2076869, 30 CFR 77.1605(d) (Tr. 39-44).

Inspector Boatright confirmed that he issued this citation on another Caterpillar 777 rock haul truck at approximately 9:45 a.m. after finding that the front horn was inoperative. He believed that the problem was caused by a loose wire, and the horn was repaired by 11:00 a.m. This citation was at the same location and area of the previous one (2076868).

Mr. Boatright stated that the purpose of the horn is to warn people and other equipment in the area, and that at

itton would indicate whether the horn was working. He escribed the truck as being otherwise "in good shape," nd that a foreman was in the pit area.

On cross-examination, Mr. Boatright indicated that he truck would not drive over the coal which was being leaned up out of the pit, and he confirmed that when the rucks are loaded they would not go faster than five miles n hour at the ramp. However, he did not know how fast they ould travel coming and going from the pit. He could not recal hether the pit crew was taken out by pick-up truck or whether ney walked out, and he stated his rationale for his gravity nding as follows (Tr. 51-53):

> JUDGE KOUTRAS: Mr. Petrick, if I may interject. Even in your scenario there, assuming that was the case, assuming that the foreman brought these three or four fellows in the pickup and the trucks come by, and these three or four fellows are out of the danger zone, if you will, on this particular day. The foreman comes back and puts them in the pickup truck and he drives away. Just at that time here comes a truck now with an inoperative horn, then in that situation his testimony would probably be the same, that the truck, the pickup truck would be exposed to a possible hazard of being struck by the truck because he wouldn't be able to sound his horn; isn't that true?
>
> THE WITNESS: That's right, if neither one of them had brakes or go up there or whatever.
>
> JUDGE KOUTRAS: That's right. But in my hypothetical, with all of these other hypotheticals then, that situation would certainly pose a more direct gravity situation than it would given the fact that these four guys over there working on the coal pile as the trucks go by on the road, that's some distance removed; isn't that true?

was less than what MSHA believed it was; isn't that true?

MR. PETRICK: That's right.

JUDGE KOUTRAS: Okay, fine.

Q. (By Mr. Petrick). Did you also inspect this triple seven truck for brakes at the same time?

A. Yes, sir.

Q. The brakes were in proper working order, were they not?

A. Yes, sir.

Q. Nothing to prevent the operator from stopping the truck in the event that somebody were to stray into the path of it?

A. This equipment -- you can have the best brakes in the world on it. When you get one of those trucks loaded, you don't stop them just like --

Q. Yeah, but in this pit area you're not talking about driving more than five miles an hour, are you?

A. No, sir, but I'm not talking -- taking long if it runs into somebody, or speeds, or somebody walks in front of it.

Q. Isn't it true with that truck driving five miles an hour, just will stop just as fast as your automobile in driving it five miles an hour?

A. No, sir, I don't think it would stop as fast as you could an automobile with 85 tons, as you said, on it.

immediately taken out of service and seat belts were inst
within an hour.

Mr. Boatright stated that the loader traveled up and
down a ramp which was at a 12-14 percent incline, and tha
the cited standard requires that when equipment is operat
in an area where there is a danger of overturning, the op
shall wear his seat belt. Here, the loader was not equip
with a belt. The only person exposed to any hazard here
would be the loader operator. Mr. Boatright determined
that there was no seat belt by a simple visual inspection
of the loader.

On cross-examination, Mr. Boatright stated that the
cited regulation requires that all loaders be equipped wi
seat belts regardless of what they are doing, and that al
operators of such loaders must wear the belts (Tr. 60).
He then stated that the question as to whether the regula
would apply would depend on how the loader is equipped, a
he confirmed that he issued the citation because he belie
there was a danger of the loader overturning. Even if th
loader were operating on a level pit area, he would still
issue the citation because the loader has to use the ramp
(Tr. 61). He described the loader as being 8 to 12 feet
wide, and while he did not measure the width of the ramp,
he estimated that it was probably 50 to 75 feet wide (Tr.
His interpretation of the regulation is that seat belts a
required if "there's a possibility of overturning" (Tr. 6

Citation 2076871, 30 CFR 77.1109(c)(1) (Tr. 72-76).

Inspector Boatright cited a D-10 bulldozer for not
having a portable fire extinguisher. He stated that he d
not consider this violation "significant and substantial"
because there was other equipment operating in the area
that had fire extinguishers on them. A fire extinguisher
was obtained from the nearby mine office and placed on th
bulldozer to abate the citation, and this took about ten
minutes.

Mr. Boatright confirmed that the cited bulldozer
was equipped with a "built-in" fire suppression system in

o the mine reclamation area, and Mr. Boatright was con
ith the fact that if another piece of equipment crossed
n front of the truck, the driver would have no way of
arning the equipment operator. He believed that "there could
e" other equipment operating in the area, and that there
as a "possibility" that the operator would not see the truck.

Mr. Boatright confirmed that no employees were exposed
o any hazards on the ground, but if the truck collided with
nother piece of equipment, "lost work days, restricted duty,
ven fatal" would result. If the condition were to continue,
e believed that it was reasonably likely that such injuries woul
ccur, and he asserted that his instructions are to issue
S&S" violations, using this standard.

Mr. Boatright stated that the shift started at 7:00 a.m.,
nd that it was possible that the truck was checked, but
hat he "couldn't say."

On cross-examination, Mr. Boatright stated that the
its at this mine are 150 feet wide and a half mile long,
nd he confirmed that the truck was traveling on a road
hich was 75 feet or more wide, hauling top soil from one
ocation to another. He conceded that the roads had more
han adequate clearance for the trucks to drive around in
he area in question. He also confirmed that he observed
o laborers on the ground in any area where the truck was
perating. He also confirmed that any elevated roadway
sed by the truck would be bermed (Tr. 153-155).

When asked to explain why his citation stated that four
eople would be exposed to a hazard, he identified two front-
nd loaders, a road grader, and another truck operating "in
he area." However, he conceded that the truck would be
topped when it was being loaded, and that he was simply
ounting the equipment that was in the area. However, he
lso indicated that he has no way of knowing when any of
hese equipment operators will get out of their equipment
Tr. 157).

Mr. Boatright that the truck and loaders are all equipped
ith seat belts, ROPS, but that he still believed that if
hey collided, the operators would be thrown around the

you've found in this case, as in the others, you saw other equipment working in the pit. You saw men that were operating that equipment, and you figured that at some point in time during the mining process it's all together possible that some fellow may get out of his equipment and walk across the road, or a piece of equipment might get over close to a truck, and that therefore this is why they should have horns and back-up alarms. And since they didn't have them, this is why you found the gravity that you found; isn't that true?

A. Yes, sir.

Citation 2076970, 30 CFR 77.1110 (Tr. 168-169).

Inspector Boatright cited a 9L Caterpillar Bulldozer
er observing that a fire extinguisher on the machine
not charged. He determined that it was not charged by
erving "a guage indicating that it had been discharged,
the pin was pulled." A fire extinguisher is needed in the
nt of small fires on the machine, and since fire extinguisher
e available on other equipment in the area, he marked
negligence "as low and unlikely." He confirmed that the
hine operator tested the extinguisher and determined
t it had been discharged.

Citation 2076971, 30 CFR 77.410 (Tr. 170-171).

Inspector Boatright cited a 14-G Caterpillar road
der after finding that the back-up alarm was inoperative.
grader was operating in the pit haul road and spoil
as, and he found the gravity to be "low" because the
hine is seldom put in reverse. The condition was corrected
hin two hours.

Citation 2076972, 30 CFR 77.208(e) (Tr. 171-175).

Inspector Boatright cited an oxygen and an acetylene
cylinder stored in a trailer near where two mechanics

Mr. Boatright indicated that the cylinders were vertical and that if the valves were knocked off by a piece of equipment or someone hitting them, the tank could be ruptured. He believed the negligence was "moderate" in that the pit foreman or superintendent should have discovered the conditio

On cross-examination, Mr. Boatright confirmed that the cylinders were immediately adjacent to each other and they were the only ones in the trailer (Tr. 175). He did not speak with the mechanics, and he indicated that the cylinders were secured by a chain which was around them. Although he did not ascertain what was in the cylinders, he indicated "they weren't empty cylinders, they were full" (Tr. 177). However, based on his interpretation of the standard, he would have cited the cylinders regardless of whether they were full or empty (Tr. 178).

Mr. Boatright confirmed that he observed no one actually using the cylinders, and when asked to explain his "significa and substantial" finding, he stated as follows (Tr. 180-186):

> Q. Your testimony is that he said that they were full?
>
> A. I asked him if the cylinders were empty or full, but I would have still cited those cylinders if they had been empty.
>
> Q. If he told you that they were empty, you would have still cited him; is that what you're telling me?
>
> A. That's exactly --
>
> Q. And what kind of gravity finding?
>
> A. I wouldn't have cited them if they had --
>
> Q. I'm not trying to confuse you, I'm trying to understand. Go ahead.
>
> A. It says they will be protected by covers.

were empty, you would have cited them because they didn't have the covers on them; right?

A. Yes, sir.

Q. But what kind of a gravity finding would you have made?

A. There wouldn't have been too --

Q. And why?

A. It was in violation of the standard.

Q. And why would there not have been too much of a gravity finding?

A. Because there wouldn't have been any hazards.

* * *

Q. Did you ever observe those mechanics or anybody else using those cylinders?

A. Not that particular day, no, sir.

Q. Would you tell me again what factors went into your determination that there was a significant and substantial danger as a result of those covers being off those cylinders?

Let me make sure -- we stopped in the middle of things. They were secured, were they not?

A. Yes, sir.

Q. And were standing?

A. Yes, they were standing.

Q. And up off the ground so that normal activity, if somebody walking on the ground, it would have been very unlikely that the top of those cylinders

Q. 50, 60 feet away from where they were working?

A. Yes.

Q. And how far away was the bulldozer they were working on? Further away than that?

A. That was about where the bulldozer was at in relation to where --

Q. Is there anything in between the bulldozer, the mechanics and those cylinders?

A. Not at that particular time, no, sir.

Q. Did you observe any other activity in the area at the time?

A. This is in the pit area, backed up behind the pit area. They haul in the pit area where this was at.

Q. Yeah, but you've got a pit that's a half a mile long?

A. Yes.

Q. Was there any other equipment in the immediate area of this trailer?

A. Not right in the immediate area, no, not right by it.

* * *

Q. Tell me what factors you used to determine that we were -- had a significant and substantial violation?

A. Well I felt like the negligence on the thing was moderate, because you had a supertendent in

They should have put the guages on it they were going to use it. There were no guages there to even put on it.

Q. Well how much is involved in putting a set of gauges on that thing? How much time?

A. Very little time.

Q. A minute and a half?

A. I'd say probably.

* * *

Q. Okay. What other factors to into being significant and substantial?

A. If it continued to stay there, I'd say it would be reasonably likely that something would happen with the equipment there.

Q. Like what?

A. Like people working in this area. Your mechanics are working on the equipment and driving around, yes, sir.

Q. But you didn't observe any of that. All you're talking about is -- getting back to this same standard that you've heretofore testified -- you're speculating that something like that might happen. You didn't actually observe that in any way, shape or form?

A. No, sir, not right next to it.

Q. Nearest the thing that you observed to those two cylinders was 60 feet away?

A. Approximately 60 feet.

in the area where coal was being loaded, and he believed it was "possible" and "reasonably likely" that these people would be in the path of the loader while it was in reverse. One of the individuals was a coal foreman, and the other two were cleaning around the coal with shovels, and they were working close to the loader. However, he saw no one actually step behind the loader or "almost get run over." The alarm was repaired that same day, and he believed the pit foreman should have noted that the back-up alarm was not working.

On cross-examination, Mr. Boatright did not believe the loader operator ever operated the loader more than five miles an hour, and at all times the employees were either in front or on the side of the machine, and when asked to explain his "significant and substantial" finding, he stated as follows (Tr. 198-202):

> Q. So taking into account your observation of Turner Brothers operation, there's no reason for any of those workers that you've denominated there, to be behind that loader in any way, shape or form?
>
> A. I don't know that those loaders are going to always be where they're at on that coal when they're in that pit area.
>
> Q. Well we're back to the same situation we've been in before. I'm talking about your observation at that particular time?
>
> A. I did not see one behind the loader at that particular time, no, sir.
>
> Q. But yet you say there's a reasonable likelihood that one of those people are going to be hurt, and I don't understand how, if they're not behind it. Are you telling me that one of them might get away and wander over there because he doesn't have anything to do, and just get behind that loader and

A. No, sir, not too often, or anyone else.

Q. They all got a job to do and there's somebody out there making sure they're doing it; isn't there?

A. Yes, sir.

* * *

Q. Okay. Now you've checked the box with regard to significant and substantial. Again, what factors went into your determination from this particular case -- on this particular case as to what other factors had caused you to check that box?

A. I think it would be reasonably likely if this loader continued to operate like this and backed over someone, that you would have a serious accident or a fatality.

Q. But here's nobody in the area, nobody's job in the area, that would -- that you've testified about, that would indicate that you saw anybody, or there was -- in other words, what I'm started to say, and I lost the train of thought of this sentence. But unless somebody went over there and was goofing off or not doing his job, there would be no likelihood at all that anybody's get hurt as a result of that back-up horn being inoperable; is that correct?

A. Like this pit -- you were talking about this pit coming down the side, coming out here 75 feet and loading the coal. When you're taking this

at Turner operation that there's nothing for anybody on foot to do in that area where the coal has already been taken?

A. They could be walking back through that area to come out of the end of the pit.

Q. For what purpose?

A. To get out of the pit. If they had to get out of the pit for some reason.

Q. They could have walked across the coal seam, too, couldn't they?

A. They sure could have. Or they could have walked between the loader and the highwall there it could have backed in there.

Q. What other factors went into your determining that there was a significant and substantial hazard?

A. Well I think if it continued, it would be reasonably likely it would happen. And I've heard --

Q. You said that?

A. Sir?

Q. You said that before?

A. I think if it occurred, you would have loss of workdays or restricted duty. That was the determination that I marked.

Q. And that's all the factors that you've taken into account in checking the box that says there was a significant and substantial hazard, or was reasonably likely so far as your gravity is concerned?

A. Yes, sir.

on level ground for two days and that a mechanic told him that a valve was not working. Mr. Boatright went to inspec the truck, and it appeared that it had been put back into service without the parking brake in operating condition.

Mr. Boatright stated that he never observed the truck parked where he tested it, and he indicated that the truck is not parked "too much." However, when the truck is not hauling coal, and when the driver is having lunch, it is parked on the north side of the pit. He believed that all of the trucks are shut down for lunch.

Mr. Boatright did not believe the pit superintendent was negligent because he thought the parking brake was probably working, and that "it could have been." However, the mechanic told Mr. Boatright that the truck had "an old rusty-looking valve" that did not appear to be working.

Mr. Boatright believed that the violation was "signifi and substantial" because "the likelihood of an injury occurring could be reasonably likely if this condition continued to occur."

On cross-examination, Mr. Boatright stated that the parking areas where the trucks park for lunch is "fairly level," but that there are some areas in the pit, which are not on level ground, where the truck could be parked. He also confirmed that the area where the truck was parked and being worked on for two days was "fairly level," and he confirmed that he has not seen many trucks roll as the resu of a defective parking brake (Tr. 207-209).

Mr. Boatright conceded that the parking areas used by the trucks during the lunch break are on level ground. He also conceded that when the trucks are parked at the end of the shift they are all parked in a row on level ground.

Mr. Boatright's reasons for a finding of "significant and substantial," is reflected in the following bench collo (Tr. 211-212):

understanding why he did it in this case. The truck didn't have a parking brake. The standard says it should have one. I'll correct the inspector, if I will -- but that's not his fault -- he says the standard requires you to have one in working order. It says no such thing. It just says to be equipped with parking brakes.

But there are decisions that say if it's not in working order, it's like not having one.

MR. PETRICK: All right.

JUDGE KOUTRAS: Maybe the standard should read, "it also shall be equipped with operable parking brakes," but it doesn't. So I'll give you that. I mean, if they're not operating, it's like not having them.

And the reason he found it was S and S is because he found that if this truck happened to be parked on an incline and got away due to a faulty brake, it would more than likely run into something.

Assuming that something was there -- and it didn't have them -- a collision and an injury. And that's why he considered it to be significant and substantial; isn't that true?

THE WITNESS: Yes, sir.

MR. PETRICK: What I'm trying to point out with his testimony is, there's no likelihood it would be parked on an incline.

JUDGE KOUTRAS: You may prevail on the finding that this may not be S and S. But he's already told you why he felt it was S and S. You're not going to change his mind.

You're free to develop your own record as to the factors that you feel he should have considered and were not present.

equipment down there. And I was checking the truck when it come into the pit. The parking brake is one of the things you check on your general inspection when you're checking the truck.

Q. Okay. Now on a general inspection, the parking brake is one of the things. But this truck -- you took him to an incline to check to see whether he had the parking brakes; is that right?

A. Yes, sir.

Q. Did you know in advance that there was something wrong with the parking brake?

A. No, sir, I sure didn't.

Q. Well what's this business about the truck had been down for a repair for a couple of days?

A. Something else was wrong with it -- this particular truck. I'd been there for two days on the inspection, and the point I'm saying, is that it should have been working after it had been down for two days. The parking brake was not in operating order.

Q. What I'm saying is, the truck was down for repairs for two days. And after they repaired it is when you decided to check it out?

A. I had not checked the truck during the general inspection. And also the law says I ought to check each piece of equipment that's operating, during the general inspection.

And they put it back into operation, and I didn't check the equipment until the operator put it back into operation.

to see whether it works or not, you're not going to check it on level ground; right?

A. No, sir.

Q. So you had the driver -- what? -- take it to an incline?

A. It was on an incline going down into the pit, and I checked it there.

Q. Were you in the cab with him?

A. No, sir, I was standing outside.

Q. And you had him stop the truck on an incline

A. Yes, sir.

Q. Was it full --

A. Checked the parking brake.

Q. Was it full or empty?

A. It was empty.

Q. The truck was empty?

A. It was stopped on an incline.

Q. And you had him set the brake?

A. Yes, sir, and it would not hold.

CENT 83-51

Inspector Boatright testified that he took some dust samples with an M.S.A. Dust Pump, and that he followed MSI usual procedures and instructions in doing so. He confirm that he took some dust samples, and also made a noise surv when he was at the mine on March 21, 1983. He gave the sa to MSHA Inspector and Health Officer James Cameron, but c

it were operating. He was not sure as to how many equipment samples were taken (Tr. 81).

Mr. Boatright explained his dust testing procedures, and he indicated that after he places the testing device on a particular piece of equipment, he will check it periodic during the course of the 8 hour shift. After removing the dust cassette, he plugs them, and places them in their respective containers with a dust record card and takes them to his office in McAlester, and the samples are never out of his possession during their transit to the office. He either personally gives them to Mr. Cameron, or leaves them on his desk or takes them to the laboratory if Mr. Cameron is not at the office. Mr. Boatright does not handle them or see them after this (Tr. 83-84).

MSHA Inspector Jemes D. Cameron testified as to his background and experience, and he testified as to the procedu which he followed in processing the dust cassette obtained by Inspector Boatright during his inspection. He confirmed that he sent the cassette to MSHA's Pittsburgh laboratory for processing and that he did so following MSHA's procedures After receiving the results of the testing, he issued citatio 2007403, because the test results indicated that the responde was out of compliance with the applicable dust standard. He confirmed that the quartz content percentage was high (Tr. 85-92).

Inspector Cameron did not know how many samples Inspector Boatright may have taken on the day of his inspecti and he confirmed that with the exception of the one sample which showed a high presence of quartz, the other samples were in compliance (Tr. 100). He also confirmed that he did not send in other samples for MSHA laboratory analyses becaus there was insufficient quartz weight gain to show any substantial presence of quartz (Tr. 101).

Inspector Cameron identified exhibit P-3 as a copy of an MSHA computer print-out showing the results of MSHA's Pittsburgh laboratory testing (Tr. 106). He explained that under MSHA's new quartz standards, if a particular piece of equipment which was tested indicated a presence of quartz in excess of the acceptable 0.5 level, a citation would be

under the cited standard, one sample which is out of compliance is suffucient to establish a violation (Tr. 125).

Respondent's Testimony and Evidence

William T. Turner, confirmed that he is the President of the respondent company, and is responsible for the supervision of all mining operations. He testified as to his education, and his mining experience, and confirmed that respondent operates four mines in the State of Oklahoma. He testified as the company safety program, daily safety inspections, and he stated that the Muskogee number two mine is comprised of a "group of pits," and he diagramed what the mine looked like (exhibit R-2; Tr. 132-135). He also described the operation of the mine in question, including the mining cycle and development of the pits (Tr. 135-138).

Mr. Turner went on to describe the operation of the cited trucks, and he indicated that the roadway where the trucks traveled were approximately 75 feet in width. He stated that under normal operating procedures, there would be no laborers on foot, and he indicated that the location where coal being loaded would be 75 to 100 feet from where trucks would be passing by (Tr. 140). He also indicated that if any trucks were in the coal loading area, they would be backing away from any trucks which may have been in the area, and that laborers would have no reason to be behind any of these trucks (Tr. 141-142).

CENT 83-54

MSHA Inspector James D. Cameron testified as to his mining background, experience, and training, and he confirmed that he issued Citation No. 2007402, on March 15, 1983. He also confirmed that he took three respirable dust samples from the operator's cab of the Reed SK-35 Drill on March 8, 9 and 10, 1983, in accordance with his usual practice and procedures, and that he tested the samples and found that average concentration of respirable dust exposure for that piece of equipment and operator was 3.7 milligrams per cubic meter of air. Since the mandatory requirements of section 71.100, require that respirable dust exposure be maintained

Inspector Cameron stated that the first sample of March 8, 1983, was rejected by MSHA's Pittsburgh laboratory because it was somehow defective. The second sample taken March 9, 1983, reflected the presence of 15 percent quartz, and the last sample taken on March 10, 1983, indicated the presence of 33 percent quartz. Under MSHA's policy guidelin and procedures, the last sample in a series where quartz is detected is used to compute the new compliance standard. In the instant case, the last sample showing 33 percent quar was computed pursuant to section 71.101, to establish the new dust compliance standard for the cited drill as 0.3 milligrams per cubic meter of air, rather than the initi standard of 2.0 milligrams per cubic meter of air as stated in section 71.100. Under the circumstances, he modified his original citation on March 23, 1983, to cite the respondent with a violation of section 71.101 rather than 71.100.

Inspector Cameron stated that after he modified his citation, he extended the abatement time after the responder removed the cited drill and replaced it with another one which was equipped with a pressurized air conditioning unit in the operator's cab. He extended the abatement time so as to permit the respondent time to collect five dust sample so as to determine whether the replacement drill was in compliance with the newly established standard of 0.3 milli Subsequent samples indicated an average dust concentration of 1.6 milligrams, and since this did not achieve compliance he decided to extend the abatement time further, and issued a section 104(b) order. He modified the order the same day in order to allow the respondent additional time to install a "Hupp Aire cab pressure system" on the drill, and after th was installed and additional samples taken, the respondent achieved compliance by lowering the dust concentration for the drill to 0.2 milligrams per cubic meter of air (Tr. 217-

Inspector Cameron confirmed that the dust samples which he took on March 8, 9, and 10, 1983, indicated the average concentration of respirable dust to be 3.7 milligrams, and h also confirmed that these test results were from his own personal weighing which he conducted at MSHA's laboratory

7.3, 2.2, and 1.8, were processed by [illegible] indicated an average concentration of 3.7, he issued the citation (Tr. 228). In short, he confirmed that his sampling of the dust exposure on the cited Reed SK 35 highwall drill indicated noncompliance, and that is why he issued the citation (Tr. 229). He confirmed that the drill was taken out of service and replaced with another one (Tr. 230).

Findings and Conclusions

Jurisdiction

MSHA Inspector Donalee Boatright testified that the respondent operates a surface strip mining operation and at one time actively mined at four strip mine locations. One of the locations ceased mining operations approximately three or four months prior to the date of the hearing.

Mr. Boatright testified that respondent's mining operations includes the stripping of overburden and top soil, the blasting of rock, the stripping of the exposed coal seam, and reclamation of the mined-out pit areas. Mr. Boatright estimated the respondent's annual coal production as between 500,000 to 750,000 tons, and he estimated that the respondent employs a total workforce of 40 miners working on rotating shifts, seven days a week.

Mr. Boatright also confirmed that the coal mined by the respondent is shipped out of state, and that the responde is regularly inspected by MSHA pursuant to the Act (Tr. 8-11) He also confirmed that the mine has an MSHA identification number, and that he has inspected it on previous occasions (Tr. 18-19).

Mr. Boatright stated that mining at the respondent's Muskogee mine ceased sometime in late 1983, and that when the mine was operational, it worked seven days a week, 12 hours a day. Respondent's other mines are still operating (Tr. 11).

Respondent's President, Tom Turner, confirmed that his company uses approximately 70 pieces of major mining equipme

Although the respondent entered a general denial of jurisdiction, it did not reassert this issue during the hearings, nor has it advanced any arguments that it is not a "mine" subject to petitioner's enforcement jurisdiction. I conclude that the testimony here indicates that the responde is a mine subject to the Act and to MSHA's enforcement jurisdiction.

Stipulations

The parties stipulated as to the accuracy of the dates, times, and places where Inspector Boatright issued his citations, as well as to the fact that they were served on the respondent's representative as shown on the face of the citation forms (Tr. 57).

Fact of Violations - Docket CENT 83-40

I conclude and find that MSHA has established by a preponderance of the evidence that the cited Caterpillar 777 rock haul truck had an inoperative back-up alarm, that a second truck had an inoperative front horn, and that the cited D-10 Caterpillar bulldozer was not equipped with a portable fire extinguisher. Accordingly citations 2076868, 2076869, and 2076871 are all AFFIRMED.

With regard to the citation concerning the lack of a seat belt on the cited front end loader, the cited standard section 77.1710-(i) requires that seat belts be provided in a vehicle where there is a danger of overturning and where roll protection is provided. Here, the loader in question was provided with ROPS and the inspector believed there was a danger of overturning because the loader had to travel up and down a ramp which was at an incline of some 12 to 14 percent. He described the width of the ramp as 50 to 75 feet, and the width of the loader as 8 to 12 feet.

The standard in question contains two conditions precedent which must be met before seat belts are required. The standard does not require seat belts for allvehicles, nor does it require seat belts for vehicles equipped with ROPS

since the loader had to travel up and down the ramp, he believed there was a "possibility" of overturning, and that is why he issued the citation. As a matter of fact, Inspecto Boatright stated that his interpretation of the standard is that a seat belt is required whenever "there is a possibil of overturning." However, the standard does not state this proposition. The standard says that seat belts are required when there is a danger of overturning. In my view, the question of whether such a danger exists depends on the facts presented at any given time.

On the facts of this case, I cannot conclude that MSHA has established that there was a danger of the loader overturning. I am convinced that the inspector issued the violation simply because the loader in question was equipped with ROPS, and that it traveled up and down the ramp. It seems to me that if MSHA wishes to require seat belts for every vehicle which is equipped with ROPS and which happens to travel up and down an incline it should specifically say so in its standard. Here, the standard only requires a ROPS equippped vehicle to have seat belts if there is danger of overturning. Based on the testimony here, I cannot conclude that MSHA has established that there was a danger of the loader overturning. Simply because it traveled up and down a ramp is insufficient evidence to establish that it would overturn. The evidence here establis that the ramp was of sufficient width to allow the loader to go up and down without being exposed to other traffic, there is no evidence as to how fast the loader traveled, the conditions under which it traveled the ramp, nor is there any testimony from any loader operators as to whether or not they were in any danger. In short, I conclude that the inspector issued the citation here because he believed that a ROPS-equipped vehicle had to have a seat belt. Under the circumstances, the citation IS VACATED.

Fact of Violations - CENT 83-51 and CENT 83-54

I conclude and find that MSHA has established by a preponderance of the evidence that the allowable respirable dust level for the tested Caterpillar D-10 bulldozer operator exceeded the requirements of cited mandatory standar

"significant and substantial."

I find that Inspector Boatright's testimony concerning tl procedures he followed in conducting and taking the dust samp to support his citation to be credible. Accordingly, Citatio No. 2007403, issued in Docket No. CENT 83-51, IS AFFIRMED.

With regard to Citation No. 2007402, issued by Inspector Cameron in Docket No. CENT 83-54, I conclude and find that MS has established by a preponderance of the evidence that the allowable respirable dust level for the tested Reed SK 35 Dri operator exceeded the requirements of cited mandatory standar section 71.101 (as amended by Inspector Cameron on April 11, 1983). Respondent's evidence did not rebut the inspector's findings, and I find that Mr. Cameron's testimony regarding h testing procedures, as well as his detailed explanation of th application of the cited section to be credible. Accordingly the citation IS AFFIRMED.

Fact of Violations - Docket No. CENT 83-55

I conclude and find that MSHA has established by a prepo derance of the evidence that the cited No. 912 rock truck had an inoperable front horn, that the 14G road grader had an in- operable back-up alarm, that the 988 front end loader had an inoperable back-up alarm, and that the 96 bulldozer was equip with a fire extinguisher which was not usable or operative. Accordingly, Citations 2076969, 2076971, 2076973, and 2076970 are all AFFIRMED.

With regard to Citation No. 2076978, concerning an inop- erative parking brake on a coal haulage truck, I take note of the fact that while the regulatory language in section 77.160 (b), that mobile equipment be equipped with adequate brakes, and that all trucks be equipped with parking brakes, may be ambiguous since it simply requires that a truck be equipped with parking brakes, with no specific requirement that they b serviceable or adequate, I conclude that a reasonable applica- tion of this standard requires that the parking brake perform the function for which it is designed. In short, a truck wit a parking brake which will not hold it or prevent its movemen while in a parking mode, regardless of where it is parked,

I conclude and find that MSHA has established a viola
by a preponderance of the evidence, and Citation No. 207697
IS AFFIRMED.

With regard to Citation No. 2076972, concerning the absence of protective covers on two compressed gas cylinder I take note of the fact that the cited standard section 77.208(e) provides that:

> Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

Inspector Boatright testified that he observed the two cylinders "stored" in a trailer "near" an area where two mechanics were working on a bulldozer. The valves were next to the cylinders, and he assumed that the mechanics had used the cylinders and simply forgot to replace the valves. The cylinders were next to each other in an upright position, and they were secured by a chain which was around them.

Mr. Boatright also testified that he did not speak to the mechanics, nor did he observe them using the cylinders. Although Mr. Boatright stated that the cylinders were full, he indicated that he would have issued a citation even if they were empty. He confirmed that the mechanics were work 50 or 60 feet away from the trailer and the bulldozer was in that same area away from the trailer. He also confirmed that the cylinders were not "being ready to be used."

It seems clear to me from the inspector's testimony that the cylinders in question were not being transported or being used by anyone at the time the inspector made his observations. Since he did not speak to the mechanics, he acted on pure assumptions and speculations which are unsupp by any credible evidence. Further, although his citation narrative gives the impression that the two mechanics were using the cylinders, the facts show otherwise.

He confirmed that the cylinders in question had no guages or hoses when he observed them.

In response to questions from respondent's counsel, Mr. Boatright conceded that the normal storage area for full and empty cylinders is at the mine office located over a half a mile away from the area of the trailer (Tr. 191). He also indicated that prior to the day he cited the cylinders, whenever he had occasion to observe the trailer or a mechanics truck, the valves and guages were always protected by covers if they were on the cylinders (Tr. 191).

The question presented here is whether or not MSHA has established that the cited cylinders were "stored" within the meaning of section 77.208(e). If they were, the next question is whether or not on the facts here presented, the cylinders were required to have protective valve covers.

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude that the two cylinders in question were stored at the time the inspector observed them. While it may be true that they were not located at the normal storage area, they were on a portable welding machine, in an upright position and were not in use. I conclude that in their location, they were stored, and that the valve covers should have been on them. The citation is AFFIRMED.

Significant and Substantial Violations

Docket No. CENT 83-40

Citation No. 2076868

Inspector Boatright's citation concerning the inoperable backup alarm on the 777 rock haul truck states that four front end loaders, two dozers, three haul trucks, and four persons on foot were in the pit area when the truck was operated in reverse.

Mr. Boatright stated that the work shift started at 7:00 a.m., and that he cited the truck at 9:30 a.m. The inoperable

nce here establishes that until its arrival at the pit loading
ea, the truck was always driven in a forward mode along a
ther wide and clearly defined route. In addition, the two
aders used to load the truck, as well as the other loaders
ich were cleaning the coal away from the loading area, were
l equipped with operable backup alarms which were sounding
ile being operated in reverse. The loaders loading the coal
re operating at the same area where the truck would back up to
loaded, and I cannot conclude that the operators were exposed
any hazards.

With regard to the four men who Inspector Boatright stated
re on foot, I cannot conclude that their duties required them
be positioned to the rear of the truck while it backed up to
loaded. Inspector Boatright conceded that he included these
n in his citation because it was possible that "somebody with-
the pit area may possibly stray within the hazard zone" (Tr.
). This could be true of any violation of this kind. However,
order to support an "S & S" violation, I believe that an in-
ector should rely on facts which reasonably indicate a likeli-
od of injury during the normal mining and loading process.
re, the inspector's beliefs that an accident or injury was
kely to occur is sheer speculation. Accordingly, his "S & S"
nding is unsupported, and it is VACATED.

tation No. 2076869

Inspector Boatright issued this citation after finding
at the front horn on another 777 rock haul truck was inopera-
ve. The condition was abated within an hour or so of the
suance of the violation, and the condition was caused by a
ose wire. The inspector cited the violation as "S & S" because
was concerned that an individual or a piece of equipment could
advertently stray in front of the moving truck, and the truck
iver would have no way of sounding his horn.

While it is true that the truck in question was in other-
se good condition, had operative brakes, and traveled approx-
ately five miles an hour while going up and down the pit ramp,
is also true that while driving to and from the pit area,
e truck would be moving faster, and the driver could encounter
expected pedestrian and vehicular traffic in and around his
ute of travel. Without an operative horn, the driver would be

Citation No. 2076969

Inspector Boatright issued this citation after finding that a Caterpillar rock haul truck used to haul top soil from the pit to the reclamation area had an inoperative front horn. He was concerned that a collision with other equipment might result in personal injuries or equipment damage.

While it is true here that the area where the other equipment noted in the inspector's citation was an area where the cited truck in question would normally be stopped during the loading process, once the truck left that area it could very well encounter other equipment while on its way to the reclamation area. Without an operative front-horn to warn other vehicular traffic, any resulting collision would likely result in injury to the vehicle operator or to the truck or other equipment. Accordingly, the inspector's "S & S" finding is AFFIRMED.

Citation No. 2076972

Inspector Boatright believed that the cylinder citation was a significant and substantial violation because "if it continued to stay there, I'd say it would be reasonably likely that something would happen with the equipment there." Based on his other testimony as to all the circumstances which prevailed at the time he observed the cylinders, particularly the fact that the cylinders were stored and secured in an upright position with a chain, were not being used, were isolated from the two mechanics, and were far removed from any other equipment, I cannot conclude that it was reasonably likely that any injury or accident would occur. In short, I can find no evidence to support the inspector's conclusion that the violation was significant and substantial. Accordingly, his finding in this regard is VACATED.

Citation No. 2076973

Inspector Boatright's citation concerning the inoperative backup alarm on the 988 front-end loader states that "three persons were on foot working in the pit where the loader was being operated." He testified that the loader was loading coal out of the pit and into the truck, and that it operated forward

When asked to explain his "significant and substantial finding, Mr. Boatright stated that he believed "it would be reasonably likely if this loader continued to operate like and backed over someone, that you would have a serious acci or fatality."

When asked to explain why he believed an accident or i would occur since no one would have any business being in t area where the loader was operating, Mr. Boatright stated t he would have no way of knowing whether anyone would be wal through the area on foot while leaving the pit. He also in cated more than once that had he permitted the loader to co tinue to operate with an inoperable backup alarm, that it w have caused an accident in the event it backed over someone

I can take judicial notice of the fact that if a loade backed over someone, it would likely cause a serious injury However, I believe that the question of whether a violation significant and substantial should be based on a reasonable likelihood of an accident based on the actual conditions wh prevailed at the time the inspector observes the condition prompts him to issue a citation.

On the facts of this citation, the inspector has not e tablished that the foreman and the two coal shovelers were close proximity to the loader, or that their duties require them to be in close proximity to the truck or behind it whe backed up. I am convinced that he included the "three pers on foot" in the citation because he could never insure that would not stray or wander behind the loader. I find this t rather speculative, particularly when he conceded on close examination that the three persons he had in mind had no bu being in the immediate area where the loading was being don that respondent's employees had clearly defined duties and sponsibilities. Under the circumstances, I conclude that t inspector's "S & S" finding is unsupportable, and it is VAC

Citation No. 2076978

This citation was issued after the inspector found tha the parking brake on a coal haulage truck was inoperative a would not hold the truck when the brake was tested by "sett

is parked on level ground in a row with other trucks. Althou the inspector alluded to the fact that there are some pit area which are not on level ground, there is absolutely no evidenc that the truck in question would ever be stopped or parked in any of these areas. As a matter of fact, the inspector conce that the haul truck in question is seldom parked during the w ing shift. Under these circumstances, I cannot conclude that was reasonably likely that an accident or injury would result from the faulty parking brake during the normal working shift when the truck is used. Absent any reasonable showing that t truck would at any time be parked on an incline, I cannot con clude that it would be likely that the truck would roll and c lide with another vehicle while it was parked on level ground Under the circumstances, the inspector's "S & S" finding is VACATED.

During the course of the hearing, respondent's counsel interposed objections with respect to the admissibility of ce tain MSHA exhibits concerning certain laboratory testing resu in connection with the dust citations issued in Dockets CENT 83-51 and CENT 83-54 (Tr. 84-128). However, the objections w later withdrawn after the parties stipulated and agreed that two dust citations were not "significant and substantial" vio tions (Tr. 263-265).

Additional Findings and Conclusions. Dockets CENT 83-40, 83- 83-54, 83-55.

Gravity

Citation 2076871, concerning an inoperative portable fir extinguisher on the D-10 bulldozer, involved a low degree of gravity since the record shows that other extinguishers were available nearby, and the bulldozer had a built-in fire supre sion system. The inoperative front horn on the 777 rock haul truck is a serious citation because the driver would be unabl to signal anyone in the event of an emergency of sudden appea ance of traffic or miners in the path of the truck. The rema ing citation for an inoperative back-up alarm on another 777 haulage truck presented a low degree of gravity since I have concluded that no one would likely be exposed to injury (CENT 83-40).

found a low degree of gravity for the inoperable back-up
The circumstances surrounding the cylinder citation refle
that no one was in jeopardy of any harm or injury, and I
concluded that the inoperative parking brake and the inop
alarm on the 988 front-end loader would not likely lead t
injuries (CENT 83-55).

I cannot conclude that the two dust citations issued
these dockets were serious violations. The inspector agr
change his initial "S & S" findings to "non-S & S". Apar
this, with regard to Citation 2007403, Inspector Cameron
firmed that he found quartz present in only one sample, b
other samples were in compliance and he did not send them
laboratory because there was insufficient quartz weight t
show any substantial presence of quartz.

With regard to Citation 2007402, the citation was ex
several times as work progressed to achieve abatement, ar
respondent finally installed pressurized air conditioned
for its drills. However, absent any detailed testimony c
ing the seriousness of the cited dust concentrations, the
occupations, etc., I have no basis for concluding that th
tion here was serious (CENT 83-51 and 83-54).

Good Faith Compliance

Inspector Boatright testified that the respondent wa
ways cooperative in correcting any condition or practice
has been cited as violations in these proceedings, and wh
mine management did not always agree with him, all of the
conditions or practices were always corrected (Tr. 141).
Mr. Boatright confirmed that the respondent exhibited goo
compliance by abating all of the citations which he issue
either within the time fixed by him or in advance of this
(Tr. 43-44). Accordingly, I conclude that respondent exh
good faith in achieving abatement for all of the cited vi
tions in these proceedings, and this is reflected in the
penalties assessed for the violations.

Negligence

Inspector Boatright testified that the respondent's
mining operations are by their very nature "pretty dusty"

the cited conditions or practices. I further conclude that all of the violations resulted from ordinary negligence.

History of Prior Violations

Respondent's history of prior violations is reflected in several computer print-outs produced by MSHA concerning the history of paid violations at the Welch #1 Mine, the Heavner #1 Mine, and the No. Two Mine, for the periods March 21, 1981, through June 5, 1983. The information submitted shows that the respondent has made payment for a total of 17 violations issued during these time periods.

Considering the inspector's testimony, as well as the information reflected in the computer print-outs, I cannot conclude that the respondent's prior compliance record is such as to warrant any increases in the civil penalties otherwise assessed by me in these proceedings.

Size of Business and Effect of Civil Penalties on the Respondent Ability to Continue in Business

I conclude that respondent is a medium sized operator, and that the penalties assessed for the violations which have been affirmed will not adversely affect its ability to remain in business.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Docket No. CENT 83-40

Citation No.	Date	30 CFR Section	Assessment
2076868	3/21/83	77.410	$50
2076869	3/21/83	77.1605(d)	$80
2076871	3/21/83	77.1109(c)(1)	$20

2067402	5/13/83	71.101	$35

Docket No. CENT 83-55

Citation No.	Date	30 CFR Section	Assessment
2076969	6/6/83	77.1605(d)	$70
2076970	6/6/83	77.1110	$30
2076971	6/6/83	77.410	$30
2076973	6/6/83	77.410	$40
2076978	6/6/83	77.1605(b)	$50
2076972	6/6/83	77.208(e)	$35

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above, in the amounts shown for each of the citations, and payment is to be made to the petitioner within thirty (30) days of the date of these decisions. Upon receipt of payment, these proceedings are dismissed.

Docket No. CENT 83-52. Findings and Conclusions.

This docket concerns five citations issued by MSHA Inspector Johnny M. Newport on May 17, 1983, after an inspection at the respondent's Welch #1 Mine. All of the citations are "non S & S" citations issued pursuant to section 104(a) of the Act.

Citations 2076408, 2076411, and 2076412 were all issued for violations of mandatory safety standard 30 CFR 77.410, after the inspector found that two front-end loaders and a grader operating in the pit area were equipped with automatic warning devices that would not give an audible alarm when the equipment was operated in reverse.

Citation 2076409 was issued after the inspector found that a front-end loader operating in the pit area was equipped with an inoperative horn. Citation 2076410 was issued because a grader operating in the pit area was equipped with a discharged fire extinguisher.

At the hearing, the parties proposed to settle this case with the respondent making full payment for the proposed initial

In addition to the foregoing, the record establishes that e of the citations were abated within 10 or 15 minutes, one in 30 minutes, and one within an hour or so of its issuance. ner, all of the inoperable devices apparently involved loose s which were corrected as soon as they were brought to the ntion of the pit superintendent.

Conclusion

After careful consideration of all of the information of rd, including the pleadings and arguments made on the record upport of the proposed settlement, I conclude and find that s reasonable. Accordingly, pursuant to 29 CFR 2700.30, IT PPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the follow- amounts within thirty (30) days of the date of this decision, upon receipt of payment by the petitioner, this case is issed.

Citation No.	Date	30 CFR Section	Assessment	Settlement
2076408	5/17/83	77.410	$ 20	$ 20
2076409	5/17/83	77.1605(d)	$ 20	$ 20
2076410	5/17/83	77.1110	$ 20	$ 20
2076411	5/17/83	77.410	$ 20	$ 20
2076412	5/17/83	77.410	$ 20	$ 20
			$100	$100

George A. Koutras
Administrative Law Judge

ribution:

n Reid Tilson, Esq., U.S. Department of Labor, Office of the citor, 555 Griffin Square, Suite 501, Dallas, TX 75202
tified Mail)

2 SKYLINE, TOUR FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 10 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JAMES M. CLARKE, Complainant	:	DISCRIMINATION PROCEEDIN
	:	Docket No. LAKE 83-97-D
	:	MSHA Case No. VINC-CD-83
v.	:	T. P. Strip
T. P. MINING, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Kennedy

The Solicitor having failed and refused to comply with my order to provide an amended complaint in support of the penalty proposal that was severed from the discrimination complaint, it is ORDERED that (1) the order approving settl ment of the discrimination complaint is AFFIRMED and the complaint DISMISSED and (2) that the severed penalty propos be, and hereby is, DISMISSED FOR WANT OF PROSECUTION.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 84-2 A.C. No. 36-00963-03525
v.	:	
	:	Mathies Mine
MATHIES COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

On April 9, 1984, the Solicitor filed a Motion for Decision and Order Approving Settlement in the above-captioned case. The one violation at issue was originally assessed at $2,000. The settlement proposed by the parties is for $1,500.

Order No. 2104294 was issued for violation of 30 C.F.R. § 75.200, for failure to comply with the approved roof control plan. Sacrifice coal was being mined when a roof fall occurred which covered the continuous miner and entrapped the operator for approximately 1 hour and 10 minutes.

The Solicitor submits that the $500 reduction from the original assessment is warranted in view of the uncertainties of litigation and after detailed consideration of the six statutory criteria. The operator's negligence was assessed as high. Subsequent investigation revealed two mitigating factors regarding the level of negligence. First, the roof control plan was not being complied with in that sacrifice stumps of coal required to be left in place were mined. However, the Solicitor points out that the roof control plan does not specify a size for the sacrifice stumps that must be left unmined. Second, prior to the coal being mined from the cited area, there existed a "weak wall" condition at that location. In order to remove this potential hazard, the operator mined coal from the front stump of the sacrifice coal and eliminated the "weak wall" condition. This "weak wall" posed a potential hazard in particular to the miners recovering the crib by the cited area. Given these two factors, the Solicitor asserts that the negligence of the operator is reduced, and accurately

The operator demonstrated a good faith effort to abate the violation. The operator reviewed the roof control plan with all miners involved in retreat mining and the violation was abated within the required time period.

I accept the Solicitor's representations and according the proposed settlement is hereby approved.

ORDER

The operator is hereby ORDERED to pay $1,500 within 30 days of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

William M. Connor, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Mark Street, Philadelphia, PA 19104 (Certified Mail)

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/fb

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 82-341-R
	:	Order No. 2002586; 7/15/8
	:	
	:	Docket No. WEVA 82-342-R
	:	Order No. 2002587; 7/15/8
UNITED MINE WORKERS OF AMERICA, Respondent	:	Docket No. WEVA 82-343-R
	:	Order No. 2002588; 7/15/8
	:	
	:	Docket No. WEVA 82-344-R
	:	Order No. 2002589; 7/15/8
	:	
	:	Docket No. WEVA 82-345-R
	:	Order No. 2002590; 7/15/8
	:	
	:	Docket No. WEVA 82-346-R
	:	Order No. 2002591; 7/15/8
	:	
	:	Docket No. WEVA 82-347-R
	:	Order No. 2002592; 7/15/8
	:	
	:	Docket No. WEVA 82-348-R
	:	Order No. 2002593; 7/15/8
	:	
	:	Docket No. WEVA 82-349-R
	:	Order No. 2002594; 7/15/8
	:	
	:	Docket No. WEVA 82-350-R
	:	Order No. 2002595; 7/15/8
	:	
	:	Docket No. WEVA 82-351-R
	:	Order No. 2002596; 7/15/8
	:	
	:	Docket No. WEVA 82-352-R
	:	Order No. 2002597; 7/15/8
	:	
	:	Ferrell No. 17 Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEVA 83-73
	:	A. C. No. 46-02493-03504
	:	

Coal Company (WCC) filed on April 20, 1984, in the above-entitled proceeding a motion for approval of settlement and for dismissal of the notices of contest. Under the parties' settlement agreement, WCC has agreed to pay reduced civil penalties totaling $38,000 instead of the civil penalties totalin $55,040 proposed by MSHA.

In orders issued in this proceeding on May 4, 1983, and August 2, 1983, I consolidated the civil penalty issues raised in Docket Nos. WEVA 83-73 and WEVA 83-143 with the issues raised in the notices of contest which seek review of 13 withdrawal orders issued on July 15, 1982, under the unwarrantable failure provisions of section 104(d) of the Federal Mine Safet and Health Act of 1977. The aforesaid order of May 4 also granted in part motions for summary decision filed by WCC and, in doing so, vacated all 13 of the withdrawal orders as having been issued in error under section 104(d) of the Act. The order of May 4 held, however, that the violations alleged by MSHA in the 13 orders survived vacation of the orders so that the 13 violations would have to be considered on their merits in the civil penalty cases (Island Creek Coal Co., 2 FMSHRC 27 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)) The parties' settlement agreement renders moot the issues raised in the notices of contest and makes it appropriate for me to grant the motion for dismissal of the notices of contest as hereinafter ordered.

Section 110(i) of the Act lists six criteria which are required to be considered in determining civil penalties. The proposed assessment sheet in the official file in Docket No. WEVA 83-143 shows that WCC produces about 5,866,000 tons on an annual basis which supports a finding that WCC is a large operator. Consequently, to the extent that civil penalties are based on the criterion of the size of the operator's business, the penalties should be in an upper range of magnitude.

There is no information in the official file or in the mo tion for approval of settlement pertaining to the operator's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that if an operator supplies no fact regarding its financial condition, a judge may find that an operator is able to pay civil penalties. In the absence of an

evaluated under the assessment procedures used by MSHA, as described in 30 C.F.R. § 100.3(c). When an operator has less than .3 of a violation per inspection day, MSHA assigns zero penalty points under section 100.3(c). There are no facts in the record to show that MSHA incorrectly evaluated the criteria of WCC's history of previous violations. Consequently, none of the penalties to be assessed in this proceeding need to be increased under the criterion of the operator's history of previous violations.

Three criteria remain to be considered, namely, negligence, gravity, and whether the operator demonstrated a good-faith effort to achieve rapid compliance after the violations were cited. The circumstances involved in the citing of the 13 violations involved in this proceeding are unique so that all three of the remaining criteria should be borne in mind in light of the facts hereinafter discussed.

An explosion occurred on November 7, 1980, in the 2 South Section of WCC's Ferrell No. 17 Mine. Five miners were killed in the explosion. Immediately after rescue and recovery operations had been completed, the 2 South Section was sealed off and MSHA has not yet completed its physical inspection of the 2 South Section. Although other sections of the mine were allowed to produce coal after MSHA's investigation was completed except for the sealed off 2 South Section, the motion for approval of settlement (p. 2) states that the Ferrell No. 17 Mine is presently closed in its entirety and that it is doubtful if the 2 South Section will ever be reopened.

The motion for approval of settlement states that WCC, without regard to its potential civil and criminal liability, cooperated fully in the investigations of the disaster. Subsequently, WCC and several of its employees were indicted for violations of the Act with respect to the explosion. WCC ultimately pleaded guilty to 16 violations and paid a total of $600,000 in fines. As part of the disposition of the criminal charges, WCC also made $475,000 in charitable contributions for improved health care, the education of physicians, and safety training in Boone County, West Virginia, where the Ferrell No. 17 Mine is located.

The 13 violations involved in this proceeding were all

No. WEVA 83-143. MSHA proposed the large penalties in Docke No. WEVA 83-143 under section 100.5 of its assessment proced which specify that MSHA may waive the use of the formula de- scribed in section 100.3 and propose penalties under section 100.5 by making narrative findings pertaining to the six cri teria. The remaining seven violations were alleged by MSHA the petition for assessment of civil penalty filed in Docket WEVA 83-73. The penalties proposed for those seven violatio range from $420 to $655 and were determined by assigning per points as described in section 100.3 of MSHA's assessment pr cedures.

While the discussion above is helpful for an understand of how the alleged violations in this proceeding were cited how the penalties were proposed, it does not specifically sh why WCC's agreement to pay $38,000 in civil penalties, as op to the $55,040 in civil penalties proposed by MSHA, is justi when evaluated under the six criteria. That sort of showing cannot be demonstrated without making a specific examination the violations which were alleged. I shall briefly consider each of the alleged violations under the docket number in wh the respective civil penalties were proposed by MSHA.

Docket No. WEVA 83-143

As previously indicated above, all of the alleged viola tions were cited in orders written pursuant to section 104(d of the Act. Since I have already found in my order issued May 4, 1983, that all 13 of the orders are invalid, they wil hereinafter be discussed as vacated orders, but the violatio alleged in the orders survived the vacation of the orders be cause they could have been issued as valid citations pursuan to section 104(a) of the Act (Island Creek Coal Co., 2 FMSHR 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)).

Vacated Order No. 2002586 alleged a violation of sectio 75.316 because permanent stoppings had been replaced by plas stoppings and the plastic stoppings had not been properly ma tained. MSHA believed that the improperly maintained stoppi may have prevented air from going to the 2 South Section whe the explosion occurred. MSHA proposed a maximum penalty of

.316 because WCC had failed to follow its approved ventila-
on plan by not providing crosscuts at or near the face of
ch entry before the entries were abandoned. The order states
at there is no evidence to show that it was unsafe to develop
e required crosscuts. MSHA considered the violation to have
en serious, to have been associated with a high degree of neg-
gence, and proposed a penalty of $5,000 which WCC has agreed
pay in full. Inasmuch as MSHA properly proposed a large pen-
ty which WCC has agreed to pay in full, no discussion is re-
ired to justify acceptance of the settlement proposal with re-
ect to vacated Order No. 2002587.

Vacated Order No. 2002588 alleged that a violation of sec-
on 75.316 occurred because WCC had frequently failed to keep
a closed position the ventilation doors which had been in-
alled in 1 South between 1 East and 1 West. MSHA considered
e violation to have been very serious, to have been associated
th a high degree of negligence, and proposed a penalty of
,000, whereas WCC has agreed to pay a reduced penalty of
,500. A reduction is justified in this instance because the
nguage used in citing the violation speaks of "numerous oc-
sions during the course of last year" when the doors were not
osed. If a hearing had been held, it is doubtful that MSHA
uld have been able to prove that the doors were open at the
me the explosion occurred so as to support a finding that
ilure to keep the doors closed specifically contributed to
e cause of the explosion.

Vacated Order No. 2002589 alleged a violation of section
.305 because WCC's section foreman admitted that he did not
amine at least one entry of each intake and return air course
its entirety when he made a weekly examination for hazardous
nditions. The section foreman traveled in the track entry
d made intermittent examinations of the intake and return
tries. MSHA considered the violation to have been very seri-
s, to have been associated with a high degree of negligence,
d proposed a penalty of $8,000, whereas WCC has agreed to pay
reduced penalty of $2,500. A substantial reduction is war-
nted in this instance because the section foreman's failure
examine the intake and return entries in their entirety dur-
g a weekly inspection could hardly be shown to have directly
ntributed to the explosion.

make a preshift examination during a 2-week period in August a
September would have contributed to an explosion which occurre
on November 7, 1980.

Vacated Order No. 2002593 alleged a violation of section
75.303 because WCC's personnel failed on November 7, 1980, to
make an inspection for methane and oxygen deficiencies in the
South Section within 3 hours before five miners entered that s
tion for the purpose of retrieving some track rails. The mine
entered the 2 South Section about 1:55 a.m. and were killed by
the explosion which occurred a short time later. MSHA conside
the violation to have been extremely serious, to have been ass
ated with a very high degree of negligence, and proposed a max
mum penalty of $10,000 which WCC has agreed to pay in full. W
agreement to pay the proposed maximum penalty makes it unneces
to discuss the matter of whether the settlement proposal may b
accepted with respect to the violation alleged in vacated Orde
No. 2002593.

Docket No. WEVA 83-73

Vacated Order No. 2002585 alleged a violation of section
75.322 because WCC's personnel had made a change in ventilatio
on October 27, 1980, which materially affected the main air cu
rent. MSHA assessed a penalty under the provisions of section
100.3 by assigning a maximum number of points under the criter
of negligence and gravity which resulted in a proposed penalty
of $655, whereas WCC has agreed to pay a reduced penalty of $2
A reduction in the proposed penalty is justified in this insta
because there is nothing in the order to show that a change in
ventilation on October 27, 1980, contributed to the explosion
which occurred over a week afterwards. Also the change in ven-
tilation involved stopping one out of two fans. There is nothi
to show that only one fan was being used on November 7, 1980,
when the explosion occurred.

Vacated Order No. 2002591 alleged that a violation of sec-
tion 75.314 occurred because WCC's personnel frequently failed
to make the required examinations in idle and/or abandoned area
not more than 3 hours before miners who check and install pump-
ing equipment entered such areas to work. MSHA assigned a maxi
mum number of penalty points under the criteria of negligence
and gravity and proposed a penalty of $655, whereas WCC has a-

and gravity and proposed a penalty of $420, whereas WCC has a
greed to pay a reduced penalty of $200. A reduction in the p
posed penalty is warranted in this instance because the order
shows that WCC's personnel did make examinations of the haula
ways and travelways before miners began working, but did not
the examinations at the required time.

Vacated Order No. 2002594 alleged a violation of section
75.303 because WCC's personnel failed on November 7, 1980, to
make a preshift examination in the 3 East off 2 North Section
within 3 hours before miners entered that section. MSHA assi
a maximum number of penalty points, and almost a maximum numb
of penalty points, under the criteria of negligence and gravi
respectively, and proposed a penalty of $500 which WCC has ag
to pay in full. MSHA properly proposed a penalty of $500 bec
the failure to perform the preshift examination occurred on t
same day as the explosion even though the failure to make the
preshift examination, in this instance, did not pertain to th
South Section where the explosion occurred.

Vacated Order No. 2002595 alleged that a violation of se
tion 75.303 occurred because WCC's personnel failed to make a
preshift examination in the 1 East Section on October 24, 198
before miners entered that section to recover belt structures
MSHA assigned the maximum number, and almost the maximum numb
of points under the criteria of negligence and gravity, respe
tively, and proposed a penalty of $500 which WCC has agreed t
pay in full. MSHA properly proposed the penalty in this inst
and WCC's agreement to pay the full amount should be approved

Vacated Order No. 2002596 alleged a violation of section
75.301 because the rescue team, while recovering the bodies o
five miners killed by an explosion, found water which was wit
12 inches of the mine roof in the No. 2 entry. The inspector
who wrote the order speculates that the water may have contri
uted to the inadequate ventilation which resulted in the expl
sion. MSHA assigned a maximum number of penalty points under
the criteria of negligence and gravity and proposed a penalty
of $655, whereas WCC has agreed to pay a reduced penalty of $
A reduction in the penalty is warranted in this instance beca
the person who wrote the order is speculating about whether
water observed in an entry after occurrence of an explosion
contributed to the cause of the explosion. The explosion cou

75.1106 because one of WCC's miners used a cutting torch on November 6, 1980, in the 1 East belt entry near the mouth of South Section. He failed to use a fireproof enclosure and a qualified person did not test continuously for methane while the torch was being used. MSHA assigned the maximum number o penalty points under the criteria of negligence and gravity a proposed a penalty of $655, whereas WCC has agreed to pay a r duced penalty of $100. The reduced penalty is warranted in this instance because large penalties have been assessed in this proceeding primarily on the basis of whether a given vio lation may have contributed to the cause of the explosion whi occurred on November 7, 1980. The torch was used on the day preceding the explosion and there is nothing in the file to show that a torch had been used on the 2 South Section at the time the explosion occurred. Moreover, section 75.1106 pro- vides for the use of a fireproof enclosure "whenever practica ble". The order does not say that use of a fireproof enclosu is practicable when the miner using the torch is cutting down belt conveyor hangers, as was being done in this instance. Finally, use of a torch in a belt entry, which has a neutral split of intake air, is not as hazardous as it would be if th torch had been lighted in a return entry or at the working faces.

I find, on the basis of the foregoing discussion of the six criteria, that the motion for approval of settlement shou be granted and that the settlement agreement should be approv

The motion for approval of settlement stresses the fact that WCC demonstrated good faith in cooperating in the invest gation of the explosion and in making a large voluntary chari able contribution to improve health and safety in Boone Count West Virginia. I believe that those are additional reasons which support acceptance of the settlement agreement.

Another point which should be emphasized is that all of the alleged violations were cited in orders written on July 1 1982, by an MSHA inspector who reviewed sworn statements ob- tained in December 1980 by MSHA's investigators. If a hearin had been held, those sworn statements would have had to have been reexamined by the parties and any party who might have wished to controvert anything in a sworn statement would have

WHEREFORE, it is ordered:

(A) The joint motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, Westmoreland Coal Company, within 30 days from the date of this decision, shall pay civil penalties totaling $38,000 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 83-73

Vacated Order No. 2002585 7/15/82 § 75.322 ...	$ 250.00
Vacated Order No. 2002591 7/15/82 § 75.314 ...	250.00
Vacated Order No. 2002592 7/15/82 § 75.303 ...	200.00
Vacated Order No. 2002594 7/15/82 § 75.303 ...	500.00
Vacated Order No. 2002595 7/15/82 § 75.303 ...	500.00
Vacated Order No. 2002596 7/15/82 § 75.301 ...	200.00
Vacated Order No. 2002597 7/15/82 § 75.301 ...	100.00
Total Settlement Penalties in Docket No. WEVA 83-73 ...	$ 2,000.00

Docket No. WEVA 83-143

Vacated Order No. 2002586 7/15/82 § 75.316 ...	$10,000.00
Vacated Order No. 2002587 7/15/82 § 75.316 ...	5,000.00
Vacated Order No. 2002588 7/15/82 § 75.316 ...	2,500.00
Vacated Order No. 2002589 7/15/82 § 75.305 ...	2,500.00
Vacated Order No. 2002590 7/15/82 § 75.303 ...	6,000.00
Vacated Order No. 2002593 7/15/82 § 75.303 ...	10,000.00
Total Settlement Penalties in Docket No. WEVA 83-143 ...	$36,000.00
Total Settlement Penalties in This Proceeding ...	$38,000.00

(C) The motion for dismissal of the notices of contest is anted and the 13 notices of contest filed by Westmoreland Coa mpany in Docket Nos. WEVA 82-340-R through WEVA 82-352-R are smissed.

artment of Labor, 4015 Wilson Boulevard, Arlington, VA 22203
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cott L. Messmore, Esq., Senior Attorney, Eastern Operations,
estmoreland Coal Company, P. O. Drawer A & B, Big Stone Gap,
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ary Lu Jordan, Esq., United Mine Workers of America, 900 - 15th
treet, NW, Washington, DC 20005 (Certified Mail)

v.	:	Docket No. WEST 83-48-D
	:	
	:	DENV CD 83-9
ITED STATES FUEL COMPANY, Respondent	:	King 4, King 5 and King 6

DECISION

Appearances: Marjorie Zamora, Vernal, Utah, pro se;
Barry D. Lindgren, Esq., Mountain States Employees Counsel, Inc., Denver, Colorado, for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

Complainant filed this proceeding under section 105(c) of e Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, seq. (the Act), claiming that she was discharged by respondent cause of safety related activity protected under the Act. itially, complainant filed a complaint of discriminatory scharge with the Secretary of Labor under section 105(c)(2) of e Act. The Secretary, after investigation, declined to pro- cute the complaint. Complainant then brought this proceeding rectly against respondent under section 105(c)(3) of the Act.

A hearing on the merits was held in Price, Utah on August 1983. Complainant appeared pro se; respondent appeared rough counsel. Both parties filed post-hearing briefs. Based the evidence presented at the hearing and considering the ntentions of the parties, I make the following decision. To e extent that the contentions of the parties are not incor- rated in this decision, they are rejected.

STATUTORY PROVISIONS

Section 105(c)(1) of the Act, provides in pertinent part as llows:

> No person shall discharge or in any manner dis- criminate against or cause to be discharged or cause

a coal or other mine. ...

Section 105(c)(2) of the Act, provides in pertinent part as follows:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination....

Section 105(c)(3) of the Act, provides in pertinent part as follows:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). ...

FINDINGS OF FACT

1. United States Fuel Company ("respondent") is a subsidia of Sharon Steel Corporation. It operates three coal mines near Hiawatha, Utah employing approximately 465 employees; supervisor and underground (Transcript at 65).

2. Marjorie Zamora ("complainant") started working for respondent as an underground miner in July 1977. After four months she was given the job as instructor and after a year and half was designated training supervisor which position she held until November 2, 1982 when whe was discharged (Tr. at 11, 12).

employment with respondent in August 1981 and thereafter the complainant and safety supervisor reported directly to Vrettos (Tr. at 139).

4. During the latter part of 1981, Vrettos and the complainant had several meetings where they discussed the objectives of the training department for the forthcoming year 1982). Vrettos proposed a rough outline of what the objectiv of the department would be and complainant ultimately submitte written plan outlining specific objectives and completion date which was approved by Vrettos (Exhibit R-1 and Tr. at 139-141).

5. In March 1982, Vrettos met with complainant to review first quarter results of the 1982 action plan for the training department. He determined that complainant had not been following the plan and "specifically" told her that they were adhere to the plan "without exception" (Tr. at 142).

6. In April 1982, complainant entered the miners bath hou at the Middlefork mine and heard several miners discussing wit representatives of the Safety Department a request that the miners sign their 5000-23 task training forms. Three miners maintained they had not received the task training indicated o the forms (Tr. at 14). Complainant told the representatives o the Safety department that the miners were right and that the forms should not be shown or exposed to other miners in the ba house. The following day complainant met with representatives the Safety department and Vrettos and stated that the 5000-23 task training forms were to be kept secure and private and tha the forms were being filled out wrong (Tr. at 16 and 17). Vrettos told complainant she was being "pretty hard on safety" nd criticized her for being an improper supervisor (Tr. at 16 Vrettos agreed to a class being held for teaching supervisors o fill out the miners task training forms. This class was scheduled and held on April 22, 1982 (Tr. at 21 and Exhs. C-1, -2, C-3 and C-4).

7. Complainant scheduled emergency medical technician raining (EMT) for May and June 1982, and volunteered to teach the classes (Exh. C-5). Vrettos offered to contact doctors fo the sessions but requested an outline of what was to be covere complainant furnished photocopies of pages from her manual whi

8. Complainant was requested by Vrettos on the May 1982 training report to furnish July and August 1982 schedule of al training planned. Vrettos wrote on the bottom of the form "I will schedule the instructor class." Complainant set up an instructors class for August 1982. She requested in a letter dated July 28, 1982, film from the Heart Association to be use in the training. Due to a party scheduled one day in August a the Mine Rescue Contest, which complainant had to attend, employees from the Safety Department did not attend the instructor's class until the 24th of September, 1982. As a result, complainant was required to ask for an extension on th date she was to return the film to the Heart Association (Tr. 34, 35 and Exhs. C6-C7).

9. In June 1982, as a result of several miners asking the complainant about annual retraining, she went through her file and listed those miners who would require such retraining (Exh C-9). Vrettos had indicated that upon submission of a list of such miners, they would be scheduled to come in on complainant shift for retraining rather than have her return to the mine during that particular miner's shift. Vrettos argued with complainant about how to set the annual retraining classes so that it would not cause confusion as to who was trained. Finally, by September 1982, Vrettos agreed to allow complainan to set up the classes for the tipple and surface miners as she suggested. However, due to deer season and other interference such as mixup on dates, only half of the miners scheduled attended the session. This put the matter 50 percent behind schedule (Tr., at 44).

10. In September 1982, an internal auditor of Sharon Steel Corporation did an audit of several of respondent's administrative functions that included safety, training, and personnel records. As to the training department, two areas w noted to be deficient. Training records (5000-23 forms) were incomplete for many underground miners based upon a random sam Also, as to mine rescue requirements, the respondent was not i compliance with the law by not having two full teams ready to provide mine rescue service to the respondent (Exh-R-2 and Tr. 147-148).

11. On October 14, 1982, complainant was requested to come

the very near future, her employment with U.S. Fuel would be
opardized. Complainant was to report to Vrettos for the
lance of 1982 and then to the Safety Training Supervisor upon
tice in 1983. Salary level would remain at its present level
thout reduction in lieu of any raise for the next twelve mont
e letter stated the following instructions;

> The Training Department's goals through the rest of 1982 are to complete the followings responsibilities:
>
> 1. As asked for since July, a schedule of the Annual Retraining by mine and individual is to be completed by Friday, October 22, 1982. If the schedule is altered you are to communicate the changes to myself within 24 hours.
>
> 2. All Maintenance Training records are to be updated, organized and reviewed with me on October 22nd. The format was given to you in October after written requests in September.
>
> 3. Your efforts to keep Task Training updated have been very unsuccessful and you have not followed by direct instruction on auditing. You will complete a monthly audit of all personnel on the property and update the Task Training form by the last day of each month. To conclude your audit, a formal notification is to be made to each respective mine foreman or department head as to the Task Training (by individual) which needs to be made Monthly you will note if the mine foreman has completed the task training or not. You are to continue to publish the Task Training list monthly.
>
> 4. The Training Room has continued to appear unsightly. The Training Room appearance is most important to setting impressions of an operations. In the future, no training materials or tools are to be left out of the storage area more than four hours before or after training takes place. A plan is to be put into effect by October 29th to identify and store all materials and equipment used for training including a diagram of the plan. On the 29th of Oct. a tour of the new layout and

effective with each publication and your editorial guidelines are very successful. Timely publication is important.

6. A Task Training check list for each classified equipment operation is to be made by March of 1983. The first two will be reviewed on November 12th...shuttle car and roof bolter. These are to be combination JSA and procedure guidelines for supervisors to use in Task Training new employees.

7. The Mine Rescue training requirements and monthly guidelines are to be outlined for 1982/83 as previously requested by October 29th in formal letter format to myself for review. Changes to the program are to be communicated to me in advance of the training session.

8. In general your time at U.S. Fuel is not used affectively to accomplish Training's objectives. In the future, all secretarial typing and copying requirements are to be channeled through me 24/48 hours in advance of need. Your time as a Training Instructor is too valuable to be repeatedly used on these items.

9. On Fridays of each week, we will review a written report of your last weeks schedule and accomplishments as well as your coming weeks schedule. Please follow the Monthly Report format (which is now being replaced by the weekly report). Please include a monthly updated calendar of events weekly.

10. Electrical Training Program. Due in June, 1982 please provide an electrical training course outline for an effective 40 hour class. The sessions are to be in two hour modules including identification of materials, aids, handouts and instructors of the course.

11. Publish monthly an update of all state and federal certifications on the property to all mine foreman and above. Include in your last weeks meeting with myself.

/s/ William C. Vrettos
William C. Vrettos
Manager, Industrial Relations
(Exh. C-10)

R. Graeme

12. On October 20, 1982, complainant contacted Frank Roybal Mark Garcia of the Union Safety Committee at the bath house King 4 and 5 mine. She told them of her problems with ning and asked if they wanted to get it "straightened out" by ing in the Mine Safety and Health Administration (MSHA). r, complainant had a conversation with George Hillas, ncial secretary of the union, and Hillas asked if there was way that the company and safety committee could get together traighten out the problems with training. Hillas did not feel the employees or the company could afford to be "hassled" by at that time (Tr. at 53).

13. On October 28, 1982, complainant and Vrettos discussed annual retraining class scheduled for November 1, 1982. lainant had prepared an outline of what she intended to cover ng the course (Exh. R-3). Vrettos suggested that complainant r certain items including three suggested by Gary Barker, ondent's general supervisor, including roof and rib control sanders be inspected on the mantrip, and the ventilation Vrettos also told complainant that she was to cover the 10 ts for surface miners required to be covered in annual aining under the union contract (Tr. 159-162). Also, Vrettos osed that Keith Thomas teach the class on the rib and roof rol plan (Tr. at 164).

14. On November 1, 1982, Vrettos attended the annual aining course scheduled that day and taught by the complainant had a pile of 5000-23 forms on her desk in which were two s she claimed were improper. After going through the training complainant informed Vrettos that there was "a possible y certification in the pile." Vrettos asked complainant to him the forms which she refused to do unless there were ers of the union safety committee there. Frank Guisman, a er of the union safety committee was summoned to the class and tos and Guisman took the forms to be copied (Tr. at 54-56). tos had been present throughout the day except for 10 to 20

and the rib and roof control plan was covered in less than
minutes time. This was the part of the course that was suppo
to be taught by Keith Thomas as discussed by Vrettos and
complainant at their October 28th meeting (Tr. at 169-170).
result of this discussion, Vrettos concluded that complainant
not keeping proper records and not doing a proper job of trai
and informed her that he was going to suspend her and audit t
files. Vrettos asked for complainant's keys to all of the fi
and requested that she come back to the office on the next da
(Tr. at 178).

16. On the following morning, Vrettos, with two secreta
employees, took random samples of the records for face bosses
electricians, and newly hired employees and found that 8 of 2
employees had not had orientation training forms completed an
placed in their files which meant they should not be working
underground. 13 of 26 new employees did not have timbering o
belt tests training completed so should not have been release
general labor underground. There were very few electrical
certifications, mine certifications, mine foreman or fire bos
certifications in the records. Of 10 to 15 experienced miner
records were reviewed and it was found that 40 percent of the
tasks they were classified in had no forms on record showing
they had been task trained (Tr. at 179).

17. A meeting was held on the day following the audit o
training department records. Vrettos, Miners' Union Internat
and district safety representative, district president, and s
committee chairman were present. Also, Gary Lauflin was in
attendance and conducted the meeting. The records from the a
of the training department were made available to the people
attendance after Lauflin had reviewed what they revealed. Th
Union representatives chose not to review these records (Tr.
180). The safety supervisor contacted MSHA and asked if it w
permissible to use College of Eastern Utah instructors to com
annual retraining for the miners. The College of Eastern Uta
a mining department with MSHA qualified instructors. Permiss
was given by MSHA for respondent to do this (Tr. at 181).

18. On November 2, 1982, Vrettos met with complainant a
informed her of the results of the audit. and told complainan
was changing her suspension to a termination as of that date.
"blue slip" given to complainant read "improper insufficient

who was younger and less experienced. The matter was settle written agreement dated January 19, 1983 wherein the respond agreed to revise complainant's personnel file from "poor wor performance" to "resigned for personal reasons", expunge file any and all comments related to this charge, provide neutral references, and discontinue its appeal action against complainant's request for unemployment compensation (Exh. R-

DISCUSSION

Under the analytical guidelines established in Secretary behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom., Consolidati Coal Corp. v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Compan FMSHRC 803 (April 1981), a prima facie case of discriminatio established if a miner proves by a preponderance of the evide that (1) she engaged in protected activity and (2) the advers action against her was motivated in any part by that protecte activity. If a prima facie case is established, the operato defend affirmatively by proving that the miner would have bee subject to the adverse action in any event because of his unp tected conduct alone. See NLRB v. Transportation Management Corp., _____ U.S. _____, 76 L.Ed. 2d 667 (1983). Also, see Secretary on behalf of Patricia Anderson v. Stafford Constru Company and Federal Mine Safety and Health Review Commission, 2d ____(D.C. Cir. 1984), stating that an agency like the Commission has ample authority to adopt the Pasula burden of allocation. See Borch v. FMSHRC, 719 F. 2d 194, 196 (6th Ci 1983).

In the case at issue here, Complainant alleges she was f or discharged from her position as training instructor for respondent because she stated at the annual retraining sessio November 1, 1982, that the training plan was not being follow and that "fraudulent" certification of training was issued fo training not given or was inadequate. Also, that this was a culmination of a problem between complainant and William Vret her immediate supervisor, which started in April 1982 (Complainant's Brief at p. 1).

I find that when the complainant asserted that there wer

matter should be referred to MSHA. The Union's position it should be worked out with the company at that particular ti rather than involve MSHA (Finding No. 12).

The specific question is whether complainant's discharge in any way or part motivated by or retaliation for the above protected activity. If so, a prima facie case is proven and t burden shifts to respondent to demonstrate by a preponderance the evidence that the complainant would have been discharged e if she had not engaged in the protected activity.

Respondent presents two arguments: 1) That complainant's termination was not motivated in any part by her protected activity. 2) If it were found that respondent was motivated in part in discharging complainant for her protected activity, sh would have also been terminated for her unprotected activities alone (Respondent's Brief at 6 and 9).

I find that the complainant has failed to show that she w fired by reason of her protected activity under the Act. The preponderance of the most credible evidence shows that complai was discharged for her failure to adequately perform the dutie assigned her as respondent's training supervisor. Also, timel ness of completion of tasks under the year's (1982) action pla was obviously a cause for conflict and discord between complai and Vrettos. This is evident from the various documents admit as exhibits in this case which describe the dissatisfaction of complainant's immediate supervisor with her job performance (E C-1, C-5, C-10, R-1, R-3).

The undisputed evidence shows that a 1982 action plan was discussed and agreed upon between Vrettos and complainant in t latter part of 1981 (Exh. R-1). The most credible evidence sh that complainant failed to follow or meet the requirements of plan by March, 1982. At a meeting between complainant and Vrettos, he informed her that she had not met the deadlines or performed the tasks set out and was in the future to adhere to "without"exception" (Finding No. 5). Also, at meetings betwee Vrettos and complainant in May and the second week in July 198 and then weekly thereafter into the fall, Vrettos "tried to ge Marge to follow the plan." (Tr. at 142). The parent company's internal audit in September 1982 found deficiencies in the training department indicating a "lack of timely follow-up to

ssigned the job of auditing the underground mines to the Safet
epartment while complainant was assigned the job of auditing
urface employees. Complainant had not performed her part of t
ask by October 28, 1982 (Tr. at 149-154).

As a result of the above continuing concern over the train
epartment, Vrettos met with complainant on October 14, 1982 an
utlined his criticisms of her performance. This was reduced t
riting (Exh. C-10). Complainant was demoted from supervisor t
raining instructor and given written job responsibilities and
eadlines (Finding No. 11). Also, complainant was advised that
er job with respondent was in "jeopardy".

On October 28, 1982, Vrettos again met with complainant an
ndicated she was failing to furnish required weekly reports of
er performance and also discussed the forth-coming annual
etraining session. Vrettos gave her specific instructions as
nat he wanted covered and that other employees were to instruc
ertain parts of the course. After his attendance at the meeti
rettos met with complainant and expressed displeasure with her
erformance and compliance with his instructions. Following an
udit of the training department records on the following morni
rettos discharged complainant.

Complainant contends that much of the above occurred becau
f Vrettos attempt to make her job difficult, if not impossible
erform, to create a paper-trail rather than give proper traini
nd transfer her duties from training to other individuals not
ualified (Complainant's Brief p. 1). Also, the charge is made
omplainant that Vrettos was upset because of her "exposure" in
he November 1, 1982 retraining session of "fraudulent
ertification" of task training forms. Whether or not Vrettos
upset" over this is not the issue here. The specific issue is
hether complainant was discharged because of these complaints.
o not find the evidence in this case supports complainant's
rgument. The facts as detailed above, show that when complain
ndicated to Vrettos her concern regarding task training, he
rranged for such a training class to be taught by complainant
Tr. at 144 and Exh. C-1 and C-2). This incident showed that
rettos responded in April 1982 in a positive manner to
omplainant's concerns.

alone.

CONCLUSIONS OF LAW

1. Respondent at all times pertinent to this case was the operator of mines subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. I have jurisdiction over the parties and subject matte of this proceeding.

3. Complainant failed to show by a preponderance of the evidence that she was fired because of any activity protected under the Act.

ORDER

Based upon the above findings of fact and conclusions of l IT IS ORDERED that this proceeding is DISMISSED.

Virgil E. Vail
Administrative Law Judge

Distribution:

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Barry D. Lindgren, Esq., Labor Relations, Mountain States Employers Counsel, Inc., 1790 Logan Street, Denver, Colorado 80201 (Certified Mail)

v.	:	Docket No. WEVA 84-92-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation 2262913; 11/29/83
	:	Kitt No. 1 Mine
	:	

DECISION

Appearances: Bronius K. Taoras, Esq., for Kitt Energy Corporation, Contestant;
Jonathan Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Merlin

This case is a Notice of Contest filed on December 27, 1983, by Kitt Energy Corporation under Section 105(d) of the Act, 30 U.S.C. § 815(d) to review a citation dated November 29, 1983, issued by an inspector of the Mine Safety and Health Administration (hereinafter referred to as "MSHA") under Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). By Notice of Hearing dated January 13, 1984, this case was set for hearing on March 13, 1984. The hearing was held as scheduled.

At the hearing, the parties agreed to the following stipulations:

(1) The applicant is the owner and operator of the subject mine.

(2) The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The Administrative Law Judge has jurisdiction of this case pursuant to Section 105 of the 1977 Act.

(4) The inspector who issued the subject order was a duly authorized representative of the

(7) Inspector Tulanowski conducted an inspection of the Kitt No. 1 Mine on November 29, 1983.

(8) In the course of his inspection, Mr. Tulanowski discovered two areas as described in the subject order along the C Mains No. 2 belt where float coal dust was present in the belt entry.

(9) The float coal dust was present only on the floor, and not on the roof or ribs or on the equipment in the entry.

(10) The float coal dust described in the order constituted a violation of 30 C.F.R. § 75.400.

(11) The subject mine is classified as a gassy mine, liberating 2,400,000 cubic feet of methane per 24 hours.

(12) Section 104(d)(1), Citation No. 2263047, issued on November 2, 1983, is the procedural basis for the order which is the subject of this proceeding.

Section 304(a) of the Act, 30 U.S.C. § 814(a), which also appears in 30 C.F.R. § 75.400, provides as follows:

> Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

The subject Order No. 2262913 describes the violative condition or practice as follows:

> There was float coal dust (black in color) deposited on the rock-dusted surface of the mine floor, beginning at survey station No. 48 + 39.83 C-Mains No. 2 Conveyor belt, and extending for a distance of approximately 600 feet inby and beginning at the tailpiece and extending for a distance of approximately 600 feet outby. This condition was reported in the preshift

FMSHRC 1954, 1959 (1979). Unwarrantable failure exists where the operator failed to correct conditions it knew or should have known existed or which it failed to correct because of a lack of due diligence or because of indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

It was reported in the preshift books that from November 14 to November 28 the belt needed dusting (Tr. 15). The operator's witnesses allege that the entry "needs dusted" in the preshift and onshift reports did not refer to float coal dust. However, this entry was the only one ever made to describe the condition of the belt. The onshift report for the very shift on which the order was issued contained an entry "needs dusted". The operator has stipulated the existence of float coal dust in this instance. (Tr. 6) A review of all of the evidence renders more persuasive the inspector's testimony, that based upon his experience the entry "needs dusted" in the preshift and on shift books indicated the presence of float coal dust (Tr. 60-66).

In addition, in more than three fourths of the reports, it was also recorded that there was work in progress (Tr. 16-17, 60). Mr. Phares, the belt cleaner who was working the midnight shift when the subject order was issued, testified about his work on the belt during this two week period (Tr. 126, 158-161). Each day he dragged the belt and worked on the areas which needed float dust cleared away (Tr. 126). He also checked the drive for splices, rock dusted the drive, checked the take up rollers, and made sure that the drive was running safely and water was correctly put on the belts (Tr. 134). Mr. Phares testified that there was a belt cleaner on another shift, Mr. Carr, who had been working the afternoon shift before the order was issued (Tr. 127, 149). Mr. Phares and Mr. Carr rotated shifts (Tr. 127). Mr. Carr did not testify and the witnesses who did testify did not know exactly what his duties were or how much time he spent cleaning the belt (Tr. 127, 149-150, 249-250).

As demonstrated by the preshift books and the testimony at the hearing, this is not a case where the operator did not work on the belt. The record shows that work was done

162). The section foreman admitted that prior to November 28, Mr. Phares had said a number of times he could not do the belt by himself (Tr. 238). The section foreman testified that he did not give Mr. Phares any help because he thought Mr. Phares was doing a good job (Tr. 239). Mr. Phares may have been doing a good job in that he was doing all that could reasonably be expected of him. However, as shown by the condition found by the inspector and admitted by the operator, and as demonstrated by Mr. Phares' testimony, he was not able to clean the entire beltline by himself. Despite the fact that Mr. Carr may have spent some time cleaning the belt on another shift, the entire length of the beltline was not cleaned. The operator should have put men on the belt, in addition to Mr. Phares and Mr. Carr, sufficient to completely clean it. The operator's failure to do so in the face of its actual knowledge of the belt's condition constituted unwarrantable failure.

A separate and distinct basis for finding unwarrantable failure exists because of the operator's failure to clean up the belt on November 28. Mr. Phares testified that at the end of the November 28 midnight shift, i.e. 8:00 a.m. on that morning, he told the mine foreman the belt was in bad shape and needed dusting (Tr. 28-29, 141). There is some conflict in the evidence over what, if anything, the operator did in the intervening two shifts to clean up the belt. Mr. Phares testified that when he returned the next night, it looked like very little had been done (Tr. 145-146, 164). The operator's evidence indicated that some portion of the belt may have been cleaned between Mr. Phares' work on the November 28 midnight shift and his work on the November 29 midnight shift (Tr. 225-229). But this evidence is not clear because there was confusion between the witnesses over the location of certain points in the belt entry (Tr. 79-83, 189-191). Moreover, the only work that could have been done in the interval between Mr. Phares' two midnight shifts would have had to have been done by Mr. Carr on the afternoon shift of November 28, but the operator's section foreman did not know what Carr did on that shift (Tr. 250). In any event, on the morning of November 28, management personnel were told by Mr. Phares that the belt was in bad shape and needed dusting. In light of this information, the

cause the belt was not completely cleaned. Old Ben Coal Corporation, supra.

In light of the foregoing, the subject order is Affirmed and the operator's Notice of Contest is Dismissed.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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Jonathan Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

v.	:	Docket No. WEST 81-100-RM
	:	Citation/Order No. 577120;
SECRETARY OF LABOR,	:	11/12/80
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	FMC Mine
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 80-140-M
Petitioner,	:	A.C. No. 48-00152-05013
	:	Docket No. WEST 80-477-M
	:	A.C. No. 48-00152-05025
v.	:	Docket No. WEST 81-233-M
	:	A.C. No. 48-00152-05041 I
FMC CORPORATION	:	Docket No. WEST 81-289-M
Respondent	:	A.C. No. 48-00152-05047 I
	:	
	:	FMC Mine

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall &
McCarthy, Salt Lake City, Utah,
for Contestant/Respondent;
Robert J. Lesnick, Esq., Office of the Solicit
U.S. Department of Labor, Denver, Colorado,
for Respondent/Petitioner.

Before: Judge Vail

STATEMENT OF THE CASE

These consolidated cases arise under the Federal Mine S
and Health Act of 1977, 30 U.S.C. § 801 et seq. In the four
civil penalty cases, the Secretary seeks to have a civil pen
assessed for an alleged violation of a mandatory safety stan
Docket No. WEST 81-100-RM is a request for review by FMC
Corporation (FMC) of Citation No. 577120 issued for an alleg
violation of 30 C.F.R. 57.3-22. Docket No. 81-233-M is the
penalty proceeding pertaining to Citation No. 577120 contain
WEST 81-100-RM, and on motion of FMC, was consolidated with
81-233-M.

respondent for the alleged violations upon the criteria as set forth in section 110(i) of the Act. Additional issues raised b the parties are identified and disposed of in the course of thi decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the followi criteria: (1) the operator's history of previous violations, (2 the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) th effect on the operator's ability to continue in business, (5) t gravity of the violation, and (6) the demonstrated good faith o the operator in attempting to achieve rapid compliance after notification of the violation.

STIPULATIONS

The parties stipulated to the following:

1. FMC does not contest the jurisdiction of Federal Mine Safety and Health Act in any of the above consolidated cases.

2. FMC mine would be considered a large operation.

3. The history of past violations would neither cause an increase or decrease in the amount of a civil penalty assessed these cases.

4. The assessment of a civil penalty would not affect FMC ability to continue in business.

5. FMC exhibited good faith in the abatement of the issue citations considered in these consolidated cases.

Docket No. WEST 80-477-M

During an inspection of the No. 8 shaft-sinking project at respondent's FMC mine, MSHA inspector Fred Hanson issued a type 107(a) order No. 337405 alleging a violation of 30 C.F.R. § 57.19-128 which reads as follows:

> Mandatory. Ropes shall not be used for hoisting when they have: (a) More than six broken wires in

which in aggregate might create an unsafe condition.

The inspector stated in the order that a section of the hoist rope, approximately 30 feet in length above the bucket, numerous broken wires and a considerable amount of distortion He stated that this created a hazard to personnel working bel in the shaft. In a subsequent action, the inspector changed "part and section" designation in the order to a 30 C.F.R. § 57.19-128(d).

Hanson testified that after bringing the rope to the sur it was cleaned with a solvent. He observed approximately 30 of the rope was in "very poor shape" with more than 6 broken wires in a lay. 1/ The crown wires were very worn with some wires sticking out (Transcript at 11-12). Melvin Jacobson, I Field Office Supervisor, testified that he observed the rope the day the citation was issued and opined that the rope was severe "state of affairs" with broken wires and abrasions (Tr 29).

A section of the rope was cut off, tagged, and sent to I Technical Support Staff in Denver, Colorado for examination. a document dated November 1, 1980, Roy L. Jameson, safety specialist, reported that from the results of the wire rope analysis and a tensil test, it was concluded that this rope specimen was appropriately removed from service because of se deterioration. The service life of the rope specimen was considered to have exceeded a safe margin of safety for man hoisting (Exh. P-6).

Respondent argues that the petitioner failed to prove by preponderance of the evidence that a violation of the cited standard occurred. Julius Jones, respondent's safety manager testified that after the rope had been pulled from the shaft placed on the ground, he ran a rag over it and found no broke wires. This is an accepted practice used to check for broken wires in a rope (Tr. at 33-34 and Exh. R-1). David Jones, respondent's safety director, testified that he did not obser

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1/ Lay. The direction, or length, of twist of the wires and strands in a rope. Zern. d. The length of lay of wire rope

condition of the cited rope was a violation of 30 C.F.R. § 57.
128(d). The specific issue is whether there was a violation o
subsection (d) of standard § 57.19-128. That is, were there a
combination of factors, less severe than the three listed
factors, that might create an unsafe condition. In light of t
petitioner's evidence, I do not find that he has proven such a
combination of factors. Also, I find that the (d) portion of
standard to be too vague, indefinite, and uncertain to give th
respondent notice of what is required to determine when the ro
should be replaced.

The testimony as to the condition of the rope is conflict
and confusing. Jameson reported that under microscopic ex-
amination, he found crack initiations and crown wear. Althoug
there is considerable general information in his report dated
November 1, 1980 (Exh. 6), and the supplement thereto, the
specifics do not show a violation of any of the first three
provisions of the standard. There was no showing of 6 broken
wires in a lay although there was testimony that crack initi-
ations be considered evidence of broken wires.

Also, no distortion was alleged to exist in the tested wi
although some corrosion was found. At the most, the report
lacked clarity. The conclusion stated the writer's opinion th
the rope should be removed from service due to deterioration.
find no mention of deterioration in the standard as grounds fo
citing an operator.

Jameson appeared at the hearing and testified regarding h
report and stated that the tensil test of the rope had no dire
relationship to the possibility of breakage of the rope. It w
only tell you whether the rope will break at a higher or lower
strength than that assigned in the catalogue listing of its
tensil strength (Tr. at 43). The balance of Jameson's testimo
failed to explain where in his report it proved a violation of
any of the three specific items listed as (a)(b) and (c) under
the standard was indicated. It must be assumed from this
evidence that the violation occurred under (d).

Petitioner's witnesses testified that the rope was unsafe
based upon generalizations. These statements would, in
combination, allude to paragraph (d) of the standard which sta

d) in § 57.19-128, and the term might has been abandoned in t
ew adopted standard.

Regarding the issue of vagueness in standards or
egulations, the Commission has authority to determine the
alidity of standards under the 1977 Act. See Sewell Coal
ompany, 2 MSHC 1345 (1981), Alabama By-Products Corporation,
SHC 1981 (1982). In order to pass constitutional muster, a
tatute or standard adopted thereunder, cannot be "so incomple
ague, indefinite or uncertain, that men of common intelligenc
ust necessarily guess at its meaning and differ as to its
pplication." Connolly v. Gerald Constr. Co., 269 U.S. 385, 3
1926). Rather, "laws (must) give the person of ordinary
ntelligence a reasonable opportunity to know what is prohibit
o that he may act accordingly." Grayned v. City of Rockford,
08 U.S. 109, 108-109 (1972).

Therefore, in this case the question is whether the opera
ould know what section (d) of the cited standard required of
find that the wording of this section would be difficult to
nterpret and follow. Also, the drafters of the replacement
egulations recently adopted felt the same way and chose not t
dopt a similar provision. Therefore, Citation No. 337405 is
acated.

ocket No. WEST 80-140-M

In this case, petitioner issued four citations and propos
enalties therefore as follows:

Citation No.	Date	30 C.F.R. Standard	Proposed Penalty
576186	8/15/79	57.12-18	$210.00
575778	8/16/79	57.15-5	255.00
337305	8/17/79	57.16-6	30.00
337306	8/17/79	57.9-2	305.00

itation Nos. 575778 and 337306

At the hearing of this case, the parties stipulated that
eposition would be taken of the inspector issuing citation No

citations. The respondent has filed no opposition to this m
and therefore the two citations are vacated.

Citation No. 576186

MSHA inspector Gerry Ferrin issued citation No. 576186, while on a regular inspection, for an alleged violation of 3 C.F.R. § 57.12-18 2/ due to the respondent's failure to have label on a main power switch to show which piece of equipmen controlled. Ferrin testified that identification of which p of equipment was controlled by the switch could not be ident by its location from the distribution center it was attached at 6). The hazard in this case was that a maintenance mecha or or electrician working on the particular piece of equipme involved could tag or lock out the wrong switch through mis-identification and receive an electrical shock (Tr. at 6, 7) There is nominally 480 volts involved here. The equipment serviced by this particular switch and cable was a fan.

The respondent did not present any evidence or submit a brief in this case. I find that a violation of § 57.12-18, alleged did occur. The operator was negligent in failing to properly label the switch involved here. The gravity is tha serious injury could occur to a miner including death as a r of such a failure to provide proper labeling. The operator abated the citation in good faith by labeling the male porti the plug at the bitter end of the trailing cable that fits i the distribution box (Tr. at 12, 15). I find the proposed penalty of $210.00 is reasonable in this case.

Citation No. 337305

MSHA inspector Martin Kovick, during a regular inspecti respondent's surface operation issued Citation No. 337305 wh

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2/ 57.12-18 Mandatory. Principal power switches shall be labeled to show which units they control, unless identificat can be made readily by location.

Respondent presented testimony at the hearing that the m site involved in this citation is located on property it leas from Union Pacific and that the railroad's property "pretty m surrounds respondent's leasehold (Tr. at 28). Robert L. May, respondent's surface safety supervisor, stated that Union Pac employees and vehicles have a right of entry onto and across respondent's property including a key to the main gate. Respondent did not produce at the hearing, or subsequent ther as agreed to at the hearing, a copy of the document or lease agreement covering Union Pacific's rights on respondent's lea property.

Respondent argued that they had entered into the lease agreement prior to the Federal Mine and Safety Act being adop and that the Union Pacific is not subject to the Act. Also, Union Pacific retained an exclusive right to right-of-way ove the leased property and is not subject to control by responde (Tr. 31).

The specific issue is whether the violation cited in thi case was the responsibility of the respondent. I find that t petitioner has failed to prove that the mine operator in this case is responsible for the Acts of the Union Pacific employe The facts show that the alleged violation of § 57.16-6 did oc on mine property under the control of respondent. Also, the parties agree that the compressed gas cylinders were in a tru owned by Union Pacific and operated by their employees. Ther no evidence, or does the petitioner contend, that the Union Pacific is an agent or independent contractor for the mine operator. Therefore, the provisions of the Act and regulatio that apply to these two situations are not applicable here.

I am unable to find any provision of the Act or its regulations, or prior decisions by the Commission or the Cour which gives direction as to whether the mine operator should

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3/ 57.16-6 Mandatory. Valves on compressed gas cylinders sh be protected by covers when being transported or stored, and safe location when the cylinders are in use.

t were allowed on the mine property as customers or employees
customers to break up rock blasted loose by the operator and
bsequently collected in a truck and hauled away. The
mmission affirmed Judge Moore's decision that the "rock
ckers" are miners in accord with section 3(g) of the Act which
fines "miner" as "any individual working in a coal or other
ne."

I find a definite distinction between the customers in the
Paso, case and other decisions involving independent
ntractors and haulers of materials and the Union Pacific em-
oyees in this case. Here, the truck was only passing through
e mine property on its way to other Union Pacific property. I
uld be stretching the usual liberal interpretation of the Act
o far to find the employees of Union Pacific in this instance
iners" and, as such, subject to the mandatory standards.
ch an interpretation would impose a requirement on the operato
be responsible and check all vehicles that entered on its
operty for whatever reason. I do not believe there is
fficient control of the Union Pacific employees in this case t
stify such an interpretation.

I find that the petitioner has failed to prove a violation
re against respondent and Citation No. 337305 is dismissed.

cket No. WEST 81-289-M

Citation No. 576979 was issued to respondent on September 8
80, and charges a violation of 30 C.F.R. § 57.9-37 as a result
a maintenance jeep being parked on a grade without the wheels
ing blocked or turned into the rib. The jeep rolled forward
nning a miner against the belt control box. The accident
sulted in injuries to the miner. The cited standard provides
follows:

> Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

The facts in this case shows that respondent's employee rtis was negligent in failing to follow the procedure for rking vehicles on a grade. Also, the gravity of the violation high as evidenced by the resulting injuries to the miner and tential for death that could result. However, the facts also ow that the respondent had required that its miners follow the ocedures outlined in the standard. Curtis testified that as a sult of a similar accident which had occurred earlier, his pervisor had told him that any time he got off the mantrip, to ke sure he put the blocks behind the wheels (Tr. at 7).

It is well-settled that under the Mine Act, an operator is able without fault for violations of the Act and mandatory andards committed by it employees. Allied Products Co. v. SHRC, _____ F. 2d _____, No. 80-7935, 5th Cir. Unit B (Feb. 1, 82). In Southern Ohio Coal Company, 4 FMSHRC 1464, (August 82), the Commission reversed an administrative law judge's cision holding that the negligence of rank-and-file non-pervisory employees may be directly imputed to the operator r the purpose of penalty assessment. The Commission stated as llows: "However, where a rank-and-file employee has violated e Act, the operator's supervision, training and disciplining o s employees must be examined to determine if the operator has ken reasonable steps to prevent the rank-and-file miner's olative conduct. Nacco, supra, 3 FMSHRC at 850-851."

The only evidence presented in this case regarding this int indicates that Curtis's supervisor had instructed him to llow the procedures outlined in the standard as late as two eks prior to the accident (Tr. at 6). Based on this, I find at the penalty proposed by the Secretary should be reduced. I nd a penalty of $100.00 is reasonable in this case.

cket No. WEST 81-233-M and
cket No. WEST 81-100-RM

Citation No. 577120 was issued on November 12, 1980 as a sult of an accident on November 6, 1980 involving a rock that ll and struck a miner. The citation alleged a violation of 30 F.R. § 57.3-22 which states as follows:

> Mandatory. Miners shall examine and test the back, face, and ribs of their working places at the be-

7 CM Panel was injured when a rock about 42 inches long, 20 inches wide and from 10 to 4 inches thick fell from the roof stricking (sic) him in the upper back. The roof was approx. 7 1/2 feet above the floor. The miner stated that he checked this rock at the beginning of the shift but did not continue to check it or support it. Approx. two hours after checking the rock it fell and struck him. This man's foreman had not been in this area during the shift prior to the accident. The shift started about 0001 hours 11/6/80 and the accident happened about 0240 hours 11/6/80. The miner arrived at his working place at approximately 0045 hours 11/6/80. The miner stated that he had sounded the rock but had not tried to scale it down." The citation was abated by holding a safety meeting and everybody wa cautioned about working under bad ground and the proper way to scale and support.

As a result of the issuance of the above citation, respondent filed a notice of contest which is docketed at WEST 81-100-RM and has been consolidated with the penalty proceeding WEST 81-233-M. In the request for review, respondent requested that the citation be vacated.

The facts in the above consolidated cases are not basically in dispute. I find that on November 6, 1980, Ivan Miller, respondent's employer, commenced work at the FMC mine at 12:00 midnight. For six months, Miller, as part of a crew, was worki in a section of the mine described as 7 CM Panel of the mine, a on the night of the accident, in 20 cross-cut of #4 room. Mill had been working in this same area for the preceding six months and during that time, was in the area 3 or 4 times a week and t only shift working in the area during that time (Tr. 7). Mille testified that he entered the mine at midnight and after loadin up the welder, it took approximately one and a half hours to ge to the area where he was to work (Tr. at 23).

The area where the roof fall occurred was in an establishe part of the mine and the roof had been bolted. Miller stated that he examined the roof by "sounding" it and barred down some loose rocks (Tr. at 6). Miller did not know where the rock tha struck him fell from so did not know if he barred that area.

orking (Tr. at 8).

MSHA Inspector William Potter testified that he went to t
MC mine to investigate this accident shortly after it was re-
orted by the respondent. When he arrived at the location
nderground, the injured miner had been removed to the hospita
e examined the site and concluded that the rock that struck t
iner had fallen from a point right over where the miner was
orking. Potter stated that he would call the location where
ock had fallen from as the "brow." (Tr. at 48).

There is some testimony by Potter in this case that a cra
ad existed in the area from where the rock fell for a period
ime and that Miller and other miners whose names he did not k
ad indicated that they had tried unsuccessfully in the past t
ar this down (Tr. 46). I reject this as being unsupported by
he most credible evidence of record. First, it is denied by
njured miner Miller who testified at the hearing that he did
now where the rock fell from. Also, the other sources
finformation was based on reference to statements made by
nidentified miners who were present during the investigation
id not testify at the trial. No testimony of any witness
orroborated this information and fails to refute the testimony
f Miller.

Based on the most credible evidence in this case, I find
hat petitioner, has not proven a violation by respondent of
57.3-23 in this case. This was not a new section of the mine
ut rather an established area where the injured miner had beer
orking for six months. Miller was an experienced underground
iner and familiar with the conditions in a trona mine such as
he FMC mine. The evidence is not disputed that Miller examine
he roof of the area upon arrival and, in fact, barred down son
oose before he began his work. He also checked the roof
frequently" while he worked. Potter testified that he thought
hecking the roof on a basis of every 45 minutes to an hour wou
e sufficient (Tr. at 33, 34). It is not determined here what
ore the respondent, or its employee, could have done to have
revented this accident. The procedure for supporting the roof
n this area of the mine is to use roof bolts on four foot
enters. This had been done. For a dangerous looking rock or
rea, that cannot be barred down, timbering is used. However

etitions for penalties, are DISMISSED. Citation No. 576186 is ffirmed and a penalty of $210.00 is assessed. Citation No. 37305 is DISMISSED.

3. In Docket No. WEST 81-289-M, Citation No. 576979 is ffirmed and a penalty of $100.00 is assessed.

4. In Docket Nos. WEST 81-233-M and WEST 81-100-RM, itation No. 577720 is vacated.

Respondent is ordered to pay a civil penalty in the total mount of $310.00 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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blc

LAWRENCE L. EVERETT, : DISCRIMINATION PROCEEDIN
Complainant :
v. : Docket No. YORK 83-6-DM
:
INDUSTRIAL GARNET EXTRACTIVES, : MSHA Case No. CD 83-58
Respondent :

DECISION

Appearances: Lawrence L. Everett, West Paris, Maine, pro s
Carol A. Guckert, Esq., Portland, Maine, for
Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant filed this case, contending that he was dis charged on June 21, 1983, from the position of electrician which he had with Respondent because of activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S § 801 et seq. Respondent denied that Complainant's discharg was related to protected activity. Respondent filed certain interrogatories on Complainant, some of which were answered and some of which Complainant refused to answer. Respondent moved to dismiss the complaint on March 12, 1984, because of Complainant's failure or refusal to answer the interrogatori I withheld my ruling on the motion. At this time, I Deny th motion because Respondent failed to establish any prejudice resulting from the refusal to answer the interrogatories in question.

Pursuant to notice, the case was heard in Auburn, Maine on March 22, 1984. The case was consolidated for hearing wi the case of Forrie W. Everett v. Industrial Garnet Extractiv Docket No. YORK 83-7-DM, but since the cases involve separat alleged discriminatory discharges, they are being decided separately. Complainant and Forrie W. Everett testified on Complainant's behalf; George B. Robinson, Deborah Hartness, Bruce Sturdevant, Thomas Scott Warbrass, Donald Bowne, Danie

When he began with Respondent, he was paid $5.00 per hour.

Complainant found the Respondent's plant to be in "a total shambles;" he had no material to work with and told Scott Hartness, the Vice President for production who had hired him, that he could not work under the conditions. Hartness assured him that he would see that whatever Complainant needed would be made available to him. An account was opened at an electric supply company and a hardware store and Complainant was authorized to buy materials and supplies.

Complainant understood that he was responsible to Hartness alone. However, for about 1 month in the Spring of 1983, Wally Hinch was made maintenance foreman, and at other times Bruce Sturdevant was given authority over both production and maintenance employees. Sturdevant never told Complainant that he was his supervisor and Scott Hartness did not specifically inform Complainant that Sturdevant was his boss. Complainant regarded Hartness as his supervisor and continued to discuss maintenance problems directly with him.

Complainant discussed safety problems in the plant with Hartness regularly, and on several occasions submitted written reports of unsafe conditions. The conditions were discussed but "that was about the end of it."

In July, 1982, an MSHA inspection team visited the facility. Complainant went through the mill with them. A number of electrical problems were pointed out and several citations were issued. Complainant was directed by Hartness to remedy the problems.

On June 20, 1983, a front-end operator, Danny Abbott, was working on a machine when it was started by another employee. Abbott had failed to lock out the machine. He told Complainant about it and Complainant told Sturdevant. Sturdevant "didn't want to talk about it. Just turned around and walked away" (Tr. 19). Complainant then notified Hartness of the incident. Hartness told Sturdevant to "make sure he understands to lock the machinery out" (Tr. 99). Respondent was apparently having

After the incident involving Danny Abbott, but still abou midmorning, Complainant was working on the engine of a fork truck. He found a short circuit, "a wiring mess" (Tr. 20), an in tracing the wires, he blew a number of fuses. He finally ran out of fuses. He worked on the truck past dinner time. Sturdevant told Complainant "look we've got to have that fork truck, it's the only one we've got and I don't care how you get it, but get it between all the other things" (Tr. 21).

Complainant punched out for dinner and drove his truck to the hardware, got the needed fuses and returned to the mill. He had a cup of coffee and sandwich; then he punched in, put the fuse back in the fork truck and had it running before the fork truck operator returned. He finished out the shift at about 5:00 p.m., and went home.

Respondent paid its employees during their lunch time and beginning in the Spring of 1983 notified all employees that they were to remain on the company premises during lunch. Thereafter, a number of employees complained to Sturdevant and Hartness that Complainant continued to leave the premises to e lunch. Hartness specifically told Complainant that he was not to leave at lunch time. Wally Hinch also told him and Complai objected with choice expletives to this direction. During the afternoon of June 20, Sturdevant told Hartness that Complainan had left again for lunch and that the other employees thought Complainant was being treated with special favor. At the end Complainant's shift, Hartness told him "I've had some complain lodged against you." Hartness then turned to talk to another employee and Complainant left for home.

On June 21, 1983, when Hartness came to work about 20 minutes before 7, Sturdevant told him that he "pulled [Complainant's] time card" (Tr. 102), which meant that he fired him. When Complainant arrived that morning, Hartness told him "Bruce pulled your time card . . . for leaving compan property during lunch hour" (Tr. 102).

Complainant then handed Hartness a written list of safety complaints alleging that lock out procedures are not being followed or enforced, general housekeeping is "practically nonexistant," safety railings and catwalks are missing, a numb

When he was discharged, Complainant earned $6.50 per hour. He remained off work following his discharge until September 17, 1983, when he began working for Cornwall Industries as a maintenance electrician and mechanic. He earns $5.30 per hour. He does not seek to be reinstated in his position with Responden

ISSUES

1. Whether Complainant's discharge was motivated in any part by activities protected under the Mine Safety Act?

2. If it was, whether Respondent established that it would have discharged him in any event for unprotected activities alon

3. If Complainant's discharge was in violation of the Act, what remedies is he entitled to?

CONCLUSIONS OF LAW

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a Complainant bears the burden of production and proof to show (1) that he engaged in protected activity and (2) that an adverse action against him was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone The operator bears a burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion that illega discrimination has occurred does not shift from the Complainant Secretary on behalf of Robinette v. United Castle Coal Co.,

It is clear that Complainant was concerned about safety a the mill, particularly electrical safety. It is also clear that there were unsafe conditions and practices at the mill. Complainant's personality was abrasive, particularly toward his supervisors, and they reacted against his abrasiveness. Part of the reaction, particularly that of Sturdevant, seems t have been the result of Complainant's bringing up safety matte The proximity to the discharge of Complainant's remonstrance to Sturdevant about the Danny Abbott lock-out problem, (a protected activity) "is itself evidence of an illicit motive." Secretary of Labor v. Stafford Construction Company and FMSHRC No. 83-1566, slip op. at 13 (D.C. Cir. April 20, 1984). I conclude, therefore, that Complainant's discharge was motivate in part by activity protected under the Mine Safety Act.

Other factors, however, played a part in the decision to discharge Complainant. The evidence establishes that he frequently violated the company rule that employees remain on the premises during lunch time - this resulted in numerous complaints from other employees who felt that Complainant was given favorable treatment because of personal friendship with Sturdevant. Complainant also had and voiced a negative attitu about the company: He expressed the hope that the company wou go bankrupt or that it would be shut down by the State environ mental authority. At a supervisors meeting on June 17, 1983, a number of supervisors complained that Complainant "had becom a source of trouble with the other men . . . [and] has been causing moral (sic) problems by telling everyone that Central Maine Power was going to shut us down; the DEP was going to sh us down . . . . he was constantly telling the other men that IGE [Respondent] was never going to make it and other disparag remarks" (Respondent's Exh. 2). I conclude, therefore, that i discharging Complainant, Respondent was also motivated by his unprotected activities.

Did Respondent establish by a preponderance of the evide that it would have discharged Complainant regardless of his protected activity? The stated reason for the discharge was Complainant's leaving the company premises during lunch time. In fact, he did and had done so in the past and was reprimande for it a number of times. He obviously believed the rule was

purchased supplies and took lunch time when he left on June 20. The supervision in the plant was lax and erratic. Scott Hartne was "at times vague" (Tr. 80) according to Sturdevant. Complainant contends that his discharge was unfair and unreason able. The fairness and reasonableness of discharging Complaina under the circumstances is not an issue which I have authority resolve, however. However unfair or unreasonable discharging Complainant may have been, I conclude that the preponderance of the evidence establishes that Complainant would have been discharged for unprotected activity alone, namely violating the company rule concerning the lunch hour and undermining employee morale. Therefore, no violation of section 105(c) of the Act h been established.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED for failur to establish a violation of section 105(c) of the Act.

James A. Broderick
Administrative Law Judge

Distribution:

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/fb

Complainant	:	
v.	:	Docket No. KENT 83-257-D(A)
	:	
D & R CONTRACTORS,	:	MSHA Case No. BARB CD 83-19
Respondent	:	

DECISION

Appearances: Jeffrey A. Armstrong, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Barbourville, Kentucky, for Complainant;
Larry E. Conley, Esq., Williamsburg, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Lonnie Jones under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" alleging that he was discharged from the partnership known as D & R Contractors on April 25, 1983, in violation of section 105(c)(1) of the Act.[1] Mr. Jones had charged in his initial complaint before this Commission that he had been unlawfully discharged on that date as an employee of Mingo Coal Co., Inc. However, by decision dated March 8, 1984, it was held that Jones had not been employed by Ming Coal Company, and that no representative or agent of Mingo Coal Company was involved in the discharge of Jones from D & R Contractors. That complaint was accordingly dismiss Lonnie Jones v. Mingo Coal Co., Inc., 6 FMSHRC 632.

[1] Section 105(c)(1) of the Act provides in part as follow "No person shall discharge * * * or cause to be dis- charged or otherwise interfere with the exercise of the st utory rights of any miner * * * in any * * * mine subject this Act because such miner * * * has filed or made a com- plaint under or related to this Act, including a complaint notifying the operator or the operator's agent * * * of an alleged danger or health violation in a * * * mine * * * because of the exercise by such miner * * * on behalf of himself or others of any statutory right afford by this

charge or removal from D & R Contractors was motivated in any part by that protected activity. Secretary, ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), reversed on other grounds, sub nom Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd. Cir. 1981). See also NLRB v. Transportation Management Corporation, 76 L.Ed.2d 667 (1983), affirming burden-of-proof allocations similar to those in the Pasula case, and Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

In this case, Mr. Jones has alternatively asserted that he was discharged on the afternoon of April 25, 1983, because he had refused to continue working overtime after working a 10-hour shift. At hearing, Jones alleged that he arrived at the Mingo coal mine for work at about 7:15 on the morning of the 25th and worked until approximately 5:00 p.m. with only a one-half hour break for lunch. He further alleged that he had a headache and the flu that day and was therefore not feeling well. He thus claims that when the "foreman", Ron Perkins, approached him that afternoon about working overtime, he declined believing it would be hazardous. Jones claims that when he was discharged later that afternoon by Perkins, that action was based upon his refusal to work any additional overtime, a work refusal protected by the Act. A miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981) See also Eldridge v. Sunfire Coal Company, 5 FMSHRC 408 (1983).

Timeliness of Filing.

It is not disputed that Lonnie Jones was removed from D & R Contractors on April 25, 1983, and that he filed his complaint of unlawful discrimination with the Federal Mine Safety and Health Administration (MSHA) on May 10, 1983, alleging that both Mingo Coal Company and D & R Contractors violated his section 105(c) rights. By letter dated June 13, 1983, MSHA notified Mr. Jones of its determination that a violation of the Act had not occurred. Allowing

delay, consisting of only 35 days, was brief and no leg
prejudice has been demonstrated. I note, moreover, tha
D & R Contractors was cited in the initial complaint to
filed by Mr. Jones and that it was therefore then given
notice of action contemplated against it under section
105(c) of the Act. Accordingly, D & R Contractors woul
expected at that time to have begun preparation of its
defense of this matter including the preservation of
evidence.

I also find that Jones could reasonably have been
fused as to the proper entity to proceed against. As a
layman of limited education, it is understandable that
may have been confused as to the legal niceties of his
employment relationship. Until Mingo Coal Company file
initial responsive pleading asserting as one of its def
that Jones was a partner of D & R Contractors and that
entity was entirely responsible for any violations unde
Act, it is understandable that Jones may not initially
joined D & R Contractors in this proceeding. It is als
significant that the referenced pleading of Mingo Coal
Company was itself filed untimely on August 17, 1983, a
that the motion for joinder was filed only 5 days there
after, on August 22, 1983. Within this framework, the
motion for joinder of D & R Contractors, filed some 35
beyond the deadline set forth in section 105(c)(3) of t
Act, is deemed to have been timely filed. [2]

The Merits.

[2] This determination of timeliness overrules a previou
determination made at hearing. The decision at hearing
made on the erroneous miscalculation that the delay in
ing the motion for joinder of D & R Contractors had bee
filed some 14 months late. When the error was discover
the undersigned, D & R Contractors was given opportunit
present additional evidence and to cross-examine witnes
who had appeared at the hearings in this case. It is n
that counsel for D & R Contractors was present throughc
the hearings and that D & R Contractors waived the oppo
ity to present additional evidence and/or to cross-exar

Whether the activity was protected depends on whether Jones entertained a "reasonable, good faith belief that a hazard" existed at the time he refused to continue working overtime. Robinette, supra, at page 810. In Robinette, the Commission defined the good faith requirement as an "honest belief that a hazard exists." In explaining the "reasonableness" portion of the test, the Commission rejected the adoption of a stringent rule requiring "objective, ascertainable evidence" to corroborate the validity of the miners' fear. Robinette, at p. 811. The Commission held that the "reasonableness" test may be met through evidence establishing "that the miners' honest perception was a reasonable one under the circumstances." See also Secretary on behalf of Pratt v. River Hurricane Coal Company, 5 FMSHRC 1529 (1983) and Harc v. Magma Copper Co., 4 FMSHRC 1935 (1982). On the facts of this particular case, I do indeed find that Mr. Jones entertained a good faith, reasonable belief that to continue working in his condition would have been unsafe.

It is not disputed that Jones had worked from 7:15 on the morning of April 25, until about 5:00 p.m. that day with only a one-half hour break for lunch. Furthermore, it is not disputed that during the course of that almost 10-hour work shift, Jones was performing a variety of strenuous physical tasks in the difficult environment of a 26-inch seam of "low coal." These activities included setting timbers, dragging water pumps, shoveling coal from the ribs, hauling a 75 pound coal drill and its cable, untangling the cable, pushing a 60 pound box of dynamite, drilling and blasting, rock dusting with 50 pound bags of rock dust, and setting ventilation curtains. Jones maintains that by 5:00 p.m., he was so tired he could "hardly get around" and his ability to concentrate was "not too good." The dangers existing for miners and particularly for a shot firer handling explosives under such conditions are obvious.

As the shot firer, Jones was also exposed to blasting powder. It is not disputed that continued exposure to the chemicals in blasting powder may induce headaches and that Jones had such a headache. Jones also felt "lousy" that day because he was still recovering from the flu. The duplicate certificate in evidence shows that on April 14, 1983, Jones had in fact been treated for the flu by R. D. Pitman, M.D.

Within this framework of evidence, it is apparent that Mr. Jones entertained a reasonable good faith belief that to continue working overtime under the conditions presented did indeed pose a safety hazard to himself and to the other miners working with him. His refusal to continue working overtime therefore constituted a protected activity within the scope of section 105(c)(1) of the Act.

In his posthearing brief, Perkins does not appear to dispute that Jones' refusal to continue working overtime was based on a reasonable good faith belief of a safety hazard, but claims that Jones failed to testify or present any other evidence that he communicated to Perkins or to any of the other partners that his work refusal was based on a matter of safety. In Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982); the Commission stated that "[w]here reasonably possible a miner refusing to work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." The purpose of the rule is to assist in "weeding out work refusals infected by bad faith." Secretary on behalf of Dunmire and Estle, supra, at p. 134. Accordingly, when the bona fides of a work refusal is not challenged, as it is not in this case, and where the representative of the operator acknowledges the existence of the safety hazard at issue, as Perkins did in this case, the communication requirement is superfluous.

In any event, contrary to the Respondent's allegations, the Complainant did in fact testify that in response to Perkin's request to continue working overtime he said "Buddy . . . I can't. I'm too tired. I might forget something around here. Somebody might get hurt bad" (Tr. 119). I find this testimony to be credible. There is, first of all, a credible factual basis to support Jones contention that after the 10-hour work shift he was suffering fatigue and a headache and that he was still recovering from the flu when Perkins asked him to work additional overtime. Perkins himself acknowledged that 9 or 10 hours was "a good day's work" and indicated that to go beyond that might be unsafe. In addition, the working relationship among the "partners" was such that it would reasonably be expected that Jones

The Complainant must also show in setting forth a prim facie case that his discharge was motivated in any part by the protected activity. It may reasonably be inferred from the timing of Jones' discharge only minutes after his refusal to continue working overtime, that it was indeed motivated by the protected activity. See Secretary on behalf of Anderson v. Stafford Construction Co., et al., No. 83-1566, D.C. Cir. April 20, 1984. There is no questio that Ron Perkins, the person who discharged Jones, knew of Jones' protected activity and it may also reasonably be inferred that Perkins was hostile toward that protected activity because it had a direct negative impact on his earnings.

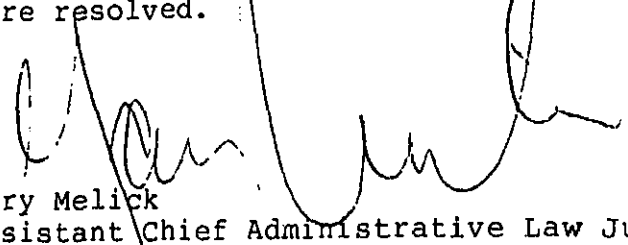
There was, moreover, no credible "non-protected" reaso advanced for Jones' discharge. Perkins testified that he fired Jones because of his bad work habits, because Jones wanted only to do the job of "tamping" and would not volunteer to do anything else and because Jones would grumble about working. In spite of these alleged serious deficiencies, however, Perkins had laid off two other miners only a short time before Jones' discharge. There is, moreover, no evidence that Perkins had previously warned Jones of these allegedly bad habits or discussed these problems with the other "partners" before the April 25th removal. Perkins' claims are indeed devoid of any corroboration and I find them to be without credibility. It is clear that Jones' discharge was motivated entirely by his protected activity. Accordingly, I find that Mr. Jones was discharged by D & R Contractors in violation of section 105(c)(1) of the Act.

ORDER

1. The parties are hereby ordered to confer regarding the possibility of settlement concerning reinstatement, costs, damages, and attorneys' fees in this case and to report to the undersigned in writing on or before May 25, 1984, concerning the results of such discussions.

2. In the event the parties are unable to reach a settlement of these matters, they are to submit to the undersigned on or before May 25, 1984, a statement of

attorneys' fees are resolved.



Gary Melick
Assistant Chief Administrative Law Judge

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PYRO MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. KENT 84-87-R
v.	:	Order No. 2338185; 1/24/84
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 84-88-R Order No. 2338186; 1/24/84 Pyro No. 9 Slope William Station

DECISION

Appearances: William M. Craft, Assistant Safety Director, Sturgis, Kentucky, for Contestant; Darryl A. Stewart, Esq., Office of the Solicitor U. S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on February 28, 1984, in Evansville, Indiana, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. I consolidated for hearing with the issues raised by the notices of contest the civil penalty issues which will be raised when the Secretary of Labor files a proposal for assessment of civil penalty with respect to the two violations of 30 C.F.R. § 75.200 alleged in Order Nos. 2338185 and 2338186. No decision by me on the civil penalty issues will be made, however, until the operator has had an opportunity to participate in the civil penalty procedures described in Part 100 of Title 30 of the Code of Federal Regulations, as hereinafter explained.

At the conclusion of presentation of evidence by both parties, I rendered a bench decision, the substance of which is set forth below:

The parties stipulated at the beginning of the hearing that each order, No. 2338185 and No. 2338186, issued on January 24, 1984, properly alleged a violation of section 75.200,

stantial". 2/

1/ The phrase "significant and substantial" comes from section 104(d)(1) of the Act which reads as follows:

"(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. [Emphasis supplied.]

2/ The Commission recently sutained the Secretary of Labor's practice of issuing citations with an indication on the face of the citations that the violations being cited are "significant and substantial" (Consolidation Coal Co., 6 FMSHRC 189 (1984)). Section 104(a) readsas follows:

"Sec. 104. (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall

o the ultimate question of whether the violations were caused
y an unwarrantable failure of the operator to comply with sec-
ion 75.200.

My conclusion as to whether there was an unwarrantable fail-
re will be based largely on the findings of fact which are set
orth below:

1. Inspector James E. Franks went to the Pyro No. 9 Slope,
illiam Station Mine on January 24, 1984, to check on a roof
all which had occurred. While he was in the mine, he went to
he No. 5 Unit and specifically to the last open crosscut be-
ween the Nos. 4 and 5 entries. At that time, he issued two
nwarrantable-failure orders. The first one was Order No.
338185 which described the violation of section 75.200 as fol-
ws (Exh. 1):

> The approved roof-control plan (dated 8/12/83, page 4, par 12(C)) was not being followed on the No. 5 Unit, ID No. 005, in that the last open crosscut between Nos. 5 and 4 entries (100 feet inby spad No. 1380, #5 entry) was unsupported for an area of approximately 15 ft. long by 20 ft. wide and the area had not been dangered off, so as to warn persons that the area was unsupported.

2. The provision in the operator's roof-control plan which
he inspector believed was violated was paragraph 12C which
eads as follows (Exh. 2, page 4):

> All places where the roof is not supported shall have conspicuous markers or signs or reflective sticks suspended from the roof placed outby the unsupported roof.

3. The inspector also wrote Order No. 2338186, pursuant to
ction 104(d)(1) of the Act, describing a second violation of
ction 75.200 as follows (Exh. 3):

> The last open crosscut between Nos. 5 and 4 entries (100 ft. inby spad No. 1380 #5 entry) No. 5 Unit, ID No. 005, was cut through in the middle and cleaned up, and the area (15 ft. long by 20 ft.

4. The inspector testified that there was a roof-bolting machine in the crosscut between the Nos. 4 and 5 entries. He stated that the fact that the roof-bolting machine was in the entry at the time he wrote both withdrawal orders was immateri in determining whether there was a violation of paragraph 12C the roof-control plan because the inspector's interpretation c that paragraph is that the company is required to hang the spe ified warning devices as soon as a place is cleaned up, regard less of whether the roof-bolting machine and its operator are immediately available to go into the place that has been clean up, for the purpose of installing roof bolts. The inspector b lieved that the warning devices were required even if an ongoi production shift is in progress. The inspector believed that was especially bad that the warning devices had not been place in the crosscut in this instance because no active production was going on in the No. 5 Unit at the time he wrote the order, although some maintenance or nonproductive work was being per- formed.

5. Contestant presented three witnesses, but the testimo of two of them is especially noteworthy. The first one was a mechanic named Henry Michael Dennis who had been asked by Ken Reed, a boss on the third shift, to do some work on a roof- bolting machine in a crosscut between the Nos. 4 and 5 entries When Dennis went to the place to do the work, he found that th roof-bolting machine was being used in the crosscut, but it wa situated under what Dennis characterized as unstable-looking rocks in the roof. Therefore, Dennis asked that the roof-bolt machine be backed towards the No. 5 entry. At that point, Den went to the repair shack to get some parts. When he returned, he found the roof-bolting machine closer to the No. 4 entry th it was to the No. 5 entry, although when he had left the roof- bolting machine, it had been closer to the No. 5 entry than it was to the No. 4 entry. Since Dennis had not seen the roof- bolting machine moved, he did not know whether it went under unsupported roof to be on the side closest to the No. 4 entry. In any event, he did the work on the brakes and the torquing d vice of the machine that he had come there to perform.

6. The other significant witness presented by the compan was Ronnie Presley who was normally assigned to the group of miners who clean up roof falls. On the morning of January 24, 1984, the day on which the orders were issued, Presley had bee

which did not look particularly stable for the performance maintenance work under them. Without thinking about the sa factor involved, he inadvertently pulled the roof-bolting m chine the remainder of the way through the crosscut. In do so, he passed under unsupported roof. Because of Presley's advertent act, the roof-bolting machine was near the No. 4 entry in the crosscut when Dennis came back to work on the machine.

7. Presley admitted during his testimony that he had lated the roof-control plan, or section 75.200, by going un unsupported roof. He stated that when he came out of the m that same day, he was reprimanded for his violating the roo control plan and company policies. He was also suspended f day because of the violation.

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At the conclusion of the evidentiary presentations, co testant's representative reiterated his belief that while v lations, as the company had conceded, had occurred, he did think that the company's complicity rose to the level of ne gence which is required to support a finding of an unwarran failure violation. The company's representative placed in record as Exhibits B through O references to various admini tive law judges' decisions. I have no disagreement with th decisions which seem to follow acceptable definitions of un rantable failure. I am not aware of a Commission decision provides any changes in the definition of unwarrantable fai given by the former Board of Mine Operations Appeals in its cision in Ziegler Coal Co., 7 IBMA 280 (1977), in which the Board defined the identical provision of unwarrantable fail in section 104(c) of the Federal Coal Mine Health and Safet Act of 1969 as follows (7 IBMA at 295-296):

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it

in contestant's roof-control plan which states that there must be a posting of conspicuous marking devices. He further noted that a violation of the roof-control plan is a violation of a mandatory standard, or a violation of section 75.200 because that section requires each operator to file and follow the provisions of a roof-control plan.

I have no reason to disagree with the aforesaid portion of the Secretary's argument, but some refinement should be made in his conclusion to the effect that any time there is a violation of a safety standard, the violation in and of itself constitutes ordinary negligence. In Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), the Commission distinguished between relying upon the acts of a rank and file miner for the purpose of finding that a violation occurred as opposed to relying upon the acts of a rank and file miner for the purpose of imputing negligence to the operator. In other words, an operator is liable for the occurrence of a violation without regard to fault (U. S. Steel Corp., 1 FMSHRC 1306 (1979)), but the negligence of a rank and file miner should not be imputed to the operator for the purpose of assessing penalties.

In any event, the above observations do not quite reach the point that I must make a ruling upon because I must determine whether the facts in this proceeding show that contestant's failure to hang the required warning devices was caused by a lack of due diligence or because of indifference or lack of reasonable care. Contestant's representative made an argument based upon the provisions of paragraph 12 of the roof-control plan which reads as follows (Exh. 2, page 4):

> 12. Before the side cuts are started, the roof in the area from which it is turned shall be supported with permanent supports according to the approved plan. Except where old workings are involved, mine openings shall not be holed through into unsupported areas. Before a mine opening holes through into a permanently supported entry, room, or crosscut, it shall be examined from both sides. The intersection so created shall be considered unsupported and be immediately dangered off with conspicuous

supported or

B. The newly created opening is timbered off with at least one row of timbers installed on not more than 5 foot centers across the mouth of the open crosscut. Where crosscuts are driven from both sides and holed through, it will not be considered an intersection but conspicuous signs shall be suspended from the roof. Once set, the jacks or posts shall not be removed until other supports are installed in the area.

C. All places where the roof is not supported shall have conspicuous markers or signs or reflective sticks suspended from the roof placed outby the unsupported roof.

Contestant's representative argues that paragraph 12 requ warning devices to be installed "immediately" in the circumsta described in the first part of paragraph 12, but contestant co tends that the word "immediately" is not used in subparagraph relied upon by the inspector. Contestant's representative ask the inspector about the lack of the word "immediately" in subparagraph C and the inspector agreed that the circumstances de scribed in the first part of paragraph 12 did not exist at the time Order No. 2338185 was written. Therefore, the inspector said that the word "immediately", as used in the first part of paragraph 12, did not apply to the violation of subparagraph C which the inspector believed was violated. In the inspector's opinion, the installation of the warning devices was required the roof-control plan irrespective of whether the word "immediately" appeared in that subparagraph.

The Secretary's counsel contradicted contestant's argumen by pointing out that subparagraph C clearly states that "[a]ll places where the roof is not supported shall have conspicuous markers, or signs, or reflective sticks suspended from the roo The Secretary's counsel contended that as soon as the company sees an unsupported place, no matter where it is, the company is required to hang the markers. He argued that it is the exi ence of the unsupported roof which requires the markers and th they are required even if the word "immediately" does not appe before the provision requiring the warning devices to be insta

here is a roof-bolting machine engaged in putting up roof bolt

The important aspect of contestant's argument is that a oof-bolting machine was being used in the crosscut at the time he inspector wrote the order. Contestant's argument is that he roof-bolting machine was there with its lights on and the perator was working on the machine. The existence of the roof olting machine and its operator would, contestant claims, have erved as a warning that there was unsupported roof in the area r the roof-bolting machine would not have been there.

The inspector's testimony controverted the above argument y pointing out that the order was written with respect to a ifferent situation from that which prevails at the face be- ause a person can walk through a crosscut, but cannot walk hrough the solid coal which one encounters at the face. Con- equently, the possibility does exist, according to the inspec- or, that even if the roof-bolting machine is operating in a rosscut, some miner may walk past the machine without consid- ring whether or not the roof-bolting machine is doing actual upporting work in a place which has been cleaned up but which as not yet been permanently supported. The roof-bolting ma- hine operator himself is engaged in important and dangerous ork and he is not paying any particular attention to other ersons in the mine who might be ordered to do work which could ause them to go past his machine under unsupported roof before e would notice that they had exposed themselves to the hazard f a possible roof fall.

The inquiry as to whether contestant showed a lack of due iligence or a lack of reasonable care has to be decided on the arrow question of whether contestant should have hung the re- uired conspicuous markers in the crosscut as soon as the coal as loaded out. The evidence shows that contestant did not in- end to send the roof-bolting machine into the crosscut immedi- tely for the purpose of installing permanent supports. The ork of supporting the roof was eventually done on an idle shif nd the foreman who sent the miner to do the roof supporting reated it as "catch-up" work. The evidence shows, therefore, hat contestant did not with due diligence hang the conspicuous arkers which were required to be installed by paragraph 12C of ts roof-control plan.

diligence in seeing that the markers were hung. The duty
hanging markers should not have been left to the preshift
miner who apparently did hang some warning devices, or at
st Exhibit C shows that he did some dangering off in the No.
nit. The point is that before the preshift examination was
e, the conspicuous markers should have been installed.

The language used by the former Board was failure to do
ething because of indifference or lack of reasonable care.
o not like to say that contestant has indifference because
er evidence indicates that contestant is not generally indif-
ent about safety, but I think that there was a lack of due
igence and of reasonable care on the part of the foreman in
s instance. Therefore, I agree with the inspector that an
arrantable failure occurred when contestant failed to put up
conspicuous markers described in Order No. 2338185 which
l hereinafter be affirmed.

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The next matter to be considered is whether the violation
ed in Order No. 2338186 was properly alleged in an unwar-
table failure order because contestant has already stipulated
t the violation of section 75.200 alleged in the order did
ur. Therefore, it is again necessary to consider whether
testant showed a lack of due diligence or a lack of reason-
e care with respect to the inspector's claim that one or more
sons went under unsupported roof.

Originally this case raised the question of whether the
pector had properly inferred that there was a violation of
tion 75.200 because he saw that a cable had been dragged
ough a crosscut and that tracks of a roof-bolting machine
eared in a crosscut under an area of unsupported roof. The
pector concluded from his observations that there was no way
machine could have gone through the crosscut having unsup-
ed roof without passing beneath the unsupported roof.

If contestant had not presented its witnesses in this case,
uld have been confronted with the aforesaid preliminary
tion of whether the inspector's inferences had been proper-
rawn. Contestant's presentation of Ronnie Presley as a

bolting machine into a secure place for maintenance work t
performed on it, he had inadvertently forgotten about the
that he was passing under roof in which permanent roof bol
not yet been installed.

In the circumstances described above, it would be imp
for me to conclude that management showed a lack of due di
or that the second violation of section 75.200 occurred be
of indifference or lack of reasonable care. In this insta
am reminded of the Commission's decision in Nacco Mining C
FMSHRC 848 (1981). In that case, the Commission held that
negligence should be imputed to the operator when a sectio
man who had always followed safety regulations and who had
been a very careful foreman, for some reason acted in an a
fashion, and went under unsupported roof which fell and ca
his death. The Commission stated in that case that it cou
hold the company to have been guilty of negligence because
company could not have anticipated that the foreman would
he did.

I believe that the events leading up to the writing o
No. 2338186 are very similar to those which existed in the
case because in this case Presley acted in a wholly unexpe
manner by tramming his roof-bolting machine through an uns
area without giving due thought. Contestant reprimanded h
his careless act and suspended him for it on the same day
happened.

Contestant's evidence shows that it did not condone P
action. If the inspector had known all the facts now in t
record of this proceeding, he would perhaps not have cited
violation in an unwarrantable-failure order. In any event
lieve the facts given above support a conclusion that the
tion of section 75.200 cited in Order No. 2338186 did not
because of a lack of due diligence or because of indiffere
a lack of reasonable care. Therefore, the violation of se
75.200 cited in Order No. 2338186 was improperly alleged a
unwarrantable-failure violation pursuant to section 104(d)
the Act. Order No. 2338186 will hereinafter be modified t
citation.

Civil Penalty Issues

earing and receipt of the transcript, MSHA's Office of Assess
ent proposed penalties of $1,000 each for the violations of
ection 75.200 cited in Order Nos. 2338185 and 2338186. A copy
f contestant's answer to the proposed assessment was received
y me on April 3, 1984. In that letter contestant stated that
* * * Order No. 2338185 was vacated and Judge Steffey indicated
e would assess the penalty on Order No. 2338186."

On April 13, 1984, I received a copy of the Assessment
ffice's reply to contestant's interpretation of the outcome of
he hearing held in this proceeding. The pertinent part of the
ssessment Office's reply is set forth below:

> As the Administrative Law Judge (ALJ) has vacated Order No. 2338185, the civil penalty will be voided. Your letter of March 29, will be considered a request to contest the civil penalty on Order No. 2338186 so that the ALJ has jurisdiction to decide on the civil penalty. In the future, you should file a separate request (blue card) for a hearing on the civil penalty, even though you have previously contested the validity of the order or citation.

It is obvious from contestant's letter to the Assessment
ffice that contestant did not understand my rulings with respec
o the civil penalty issues. My order providing for hearing
ssued on February 17, 1984, explained on page 2 that the civil
enalty issues were being consolidated for purpose of receipt of
vidence pertaining to the six criteria, but that order and my
pening remarks at the hearing stated as follows (Tr. 2):

> * * * I have consolidated for hearing with the issues raised by the notices of contest the civil penalty issues which will be raised when and if the Secretary of Labor files a proposal for assessment of civil penalty with respect to the two violations of section 75.200 alleged in Order Nos. 2338185 and 2338186. No decision by me on the civil penalty issues, however, will be rendered until such time as the operator has had an opportunity to participate in the civil penalty procedures described in Part 100 of Title 30 of the Code of Federal Regulations.

alty portion of the case is still pending because the proposal for assessment of civil penalty hasn't been filed yet. I want the company to have the benefit of conference before I assess the penalty. Therefore, in this instance, when my decision comes out, I shall convert the Order 2338186 to a citation, checking the S and S portion of the citation. Therefore, unless the Department of Labor appeals my decision and gets me reversed on the conversion of the order to a citation, the Secretary will propose a penalty for a citation in this instance, instead of an order.

I shall hereinafter explain for contestant's benefit wh procedures should be followed with respect to the civil pena aspects of the proceeding. Since this was probably contesta first exposure to a consolidated notice-of-contest and civil penalty proceeding, I am not surprised that some confusion e as to what my bench decision held, particularly when it is r ized that contestant did not have a copy of the transcript o bench decision when it wrote its letter to the Assessment Of

The first aspect of contestant's letter to the Assessme Office which needs to be corrected is the fact that my bench cision stated that I would vacate Order No. 2338186 and woul convert the order to a citation because the violation survive the vacation of the order (Island Creek Coal Co., 2 FMSHRC 2 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980 The length of the hearing was considerably reduced by contes ant's having stipulated at the commencement of the hearing (4) that both violations had occurred and that both could app priately be considered as "significant and substantial" viol tions. In such circumstances, it is especially true in this proceeding that the violation would survive my finding that unwarrantable failure existed with respect to Order No. 2338

The quotation from the Assessment Office's reply to con testant's letter shows that the Assessment Office was under erroneous impression that my bench decision had not only vac Order No. 2338185 but had also held that no violation of sec 75.200 had been proven. The Assessment Office's reply is co rect, however, in stating that it is necessary for a proposa

15-13881-03520, but that proposed assessment included proposed assessments for Citation Nos. 2074792, 2074793, and 2338327. If the Assessment Office fails to sever the proposed assessments for Order Nos. 2338185 and 2338186 from the other three citation the civil penalty case may end up before me with three alleged violations to be considered which were not the subject of the hearing held with respect to Order Nos. 2338185 and 2338186. Therefore, I would suggest that the Assessment Office propose penalties for the violations of section 75.200 alleged in Order Nos. 2338185 and 2338186 under an assessment control number which would include only those two orders. Additionally, the proposed assessment should refer to No. 2338186 as a citation issued under section 104(a) of the Act instead of an order issued under section 104(d)(1) of the Act. The new citation designation would be with the "significant and substantial" block checked on it.

If the Assessment Office is agreeable to the above suggestion, the amended proposed assessment should be resubmitted to contestant for its consideration. Contestant should bear in mind that it is entitled to ask for a conference with respect to Order No. 2338185 and Citation No. 2338186 just as it would with respect to any other proposed assessment. If contestant, however, wishes to have me assess a penalty for both Order No. 2338185 and Citation No. 2338186, it should file a "blue card" with respect to both the order and the citation. Contestant is also free to pay the proposed penalty for either or both the violations. If contestant elects to pay the penalty for one violation, it may do so and then file a blue card with respect to the violation for which it wishes to have me assess the penalty. After the Solicitor's Office has filed a proposal for assessment of civil penalty with respect to one or both of the violations which contestant did not elect to pay at the Assessment Office level, contestant should, as usual, file an answer to the proposal for assessment of civil penalty. In that answer, contestant should state that a hearing has already been held by me with respect to the violations alleged in Order No. 2338185 and Citation No. 2338186 and that the civil penalty case should be forwarded to me for the purpose of assessing a penalty (or penalties) on the basis of the hearing record made in this proceeding.

I believe that the discussion above should enable the Assessment Office and contestant to dispose of the procedural steps required for dealing with all civil penalty issues.

(B) The notice of contest filed by Pyro Mining Company in ocket No. KENT 84-88-R is granted and Order No. 2338186 issued anuary 24, 1984, under section 104(d)(1) of the Act, is vacated nsofar as it purports to have been issued as an unwarrantable- ailure order and is modified to a citation issued under section 04(a) of the Act with a designation of a "significant and sub- tantial" violation.

(C) The civil penalty issues are severed from this consol- dated proceeding for disposition under Part 100 of Title 30 of he Code of Federal Regulations, with the understanding that if yro Mining Company files a request for hearing (or blue card) ith respect to either or both violations alleged in either rder No. 2338185 or Citation No. 2338186, the proposal for ssessment of civil penalty with respect to the request for hear ng will be forwarded to me for assessment of a penalty (or pen- lties) based on the record in this proceeding.

Richard C. Steffey
Administrative Law Judge

istribution:

illiam M. Craft, Assistant Director of Safety, Pyro Mining ompany, P. O. Box 267, Sturgis, KY 42459 (Certified Mail)

arryl A. Stewart, Esq., Office of the Solicitor, U. S. Depart- ent of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nash- ille, TN 37203 (Certified Mail)

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MAY 16 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-82
	:	A.C. No. 33-01869-03504
v.	:	
	:	Getz Strip
GETZ COAL SALES, INC., Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards promulgated pursuant to the Act. Respondent filed a timely contest and requested a hearing. A hearing was convened in Youngstown, Ohio, on April 12, 1984. Although the petitioner appeared at the hearing, respondent's counsel did not.

As a result of the failure by respondent's counsel to appear, the hearing proceeded without him, and the respondent was held to be in default. Further, in view of this respondent's past history of failing to appear at scheduled hearings, with absolutely no effort on its part to advise the court of its non-appearance, and in view of this

Issues

The principal issue presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additiona issues raised are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessmen section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the opera was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempti to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

This case concerns four section 104(a) citations issue by MSHA Inspector James A. Boyle, during the course of an inspection of the respondent's mine on May 16, 1983, and th cited conditions and practices follow below.

Citation No. 2067133, cites a violation of mandatory safety standard 30 C.F.R. 77.1710(i), and describes the following condition or practice:

not maintained in a working condition. The left cab door was held closed with a tarp strap, the latch was missing. The right cab door was held open with a tarp strap, the inside door handle was missing. Kenny Doren was operating the bulldozer at the 002-0 pit, stripping overburden.

Citation No. 2067135, cites a violation of 30 C.F.R. 1710(i), and states the following condition or practice:

Seatbelts were not provided for the Caterpillar 90G bulldozer (Serial No. 66A10646), where there is a danger of overturning and where roll protection (ROPS) is provided. Dave Henry was operating the bulldozer at the 002-0 pit, stripping overburden, under the supervision of Roy Cusick, foreman.

Citation No. 2067136, cites a violation of 30 C.F.R. 1606(c), and states the following condition or practice:

An equipment defect affecting safety was present on the Caterpillar D9G bulldozer (Serial No. 66A 10646), in that the operator's cab doors were not maintained in a working condition. The left cab door latch was missing and the latch was bad, had to be held shut with a piece of wire. Dave Henry was operating the bulldozer at the 002-0 pit, stripping overburden, under the supervision of Roy Cusick, foreman.

itioner's Testimony and Evidence

MSHA Inspector James A. Boyle, testified as to his kground and experience as a surface mining inspector, he confirmed that on May 16, 1983, he inspected the z Strip Mine, located in the Lisbon, Ohio, area, and ed and operated by Roland A. Getz (Tr. 20-22). He also firmed that he inspected two Caterpillar D9G bulldozers that he issued four citations for certain conditions ch he found which were in violation of the cited mandatory ety standards (Exhibits P-3 through P-6; Tr. 46).

Mr. Boyle indicated that the area where the bulldozers were observed stripping was "fairly level." However, he also indicated that the cited bulldozers were continuously required to travel up and down a ramp area in order to dispose of the material which they were mining, and that while the area is sometimes slippery when wet, on the day he cited the violations, it was dry (Tr. 25). He described the ramp as being 150 to 155 feet long, with an open end, and he stated that one side would be against the spoil, and the other side would be "open." He also indicated that the distance from the top of the ramp down into the pit was 50 to 70 feet, but that on the day in question it was probably 50 feet (Tr. 28).

Mr. Boyle conceded that while the bulldozers were operati in the pit there would be no danger of their overturning. However, since they had to travel the ramp area during their normal operation, there would be a danger of overturning on the ramp (Tr. 29). He went on to describe the conditions he cited, and he confirmed that the cited equipment was not equipped with the required seatbelts, and that the door on one of the bulldozers had a missing latch and was secured by a strap, and the doors on the other bulldozers were not maintained in proper working order in that the latch and door handle was missing and had to be held shut with a piece of strap (Tr. 30-32). Although the actual mechanical operation of the dozers was not affected, Mr. Boyle believed that the cited conditions did affect the safety of the operators (Tr. 32-34).

In response to further bench questions, Mr. Boyle stated that the reason he did not fill in the "negligence" and "gravity" blanks on the face of the citations which he issued is that since he found that the violations were not "significa and substantial," his instructions were that he was not to fil out those blanks when he issues "non-S&S" violations (Tr. 36-3

With regard to the conditions of the door latches which he cited, Inspector Boyle was of the opinion that the operator would have difficulty in getting out of the equipment in the event it overturned, and since the bulldozers have hydraulic

seated (Tr. 32-33).

Findings and Conclusions

In view of the respondent's failure to appear at the hearing pursuant to notice, I have considered this as a waiver of his right to be heard on the record and to defend against the violations, and I held him in default. While Commission Rule 63, 29 C.F.R. 2700.63, requires that a show cause order be issued before a party is held in default for failing to answer an order by the Judge, under the circumstances of this case, respondent is not prejudiced by my not issuing such an order. Rule 2700.63(b) authorizes a judge to enter summary civil penalty dispositions where a respondent is in default, and based on this respondent's long history of ignoring notices, orders, and other Commission findings, any further notices to the respondent would simply be fruitless.

Since the respondent failed to appear at the hearing, I have decided this case on the basis of the evidence and testimony presented by the petitioner in support of the citations. After consideration of the unrebutted testimony of Mr. Boyle, as well as the evidence and arguments made by the petitioner in support of its case, I conclude and find that the petitioner has established the fact that the violations occurred as stated by the inspector in the citations which he issued. Accordingly, the citations are all AFFIRMED.

I take note of the fact that one of the purported reasons for the respondent's counsel failing to appear at the hearing is that since the four citations were "single penalty assessments" totalling $80, counsel apparently believed that it was not "worth the litigation effort." However, it is clear that I am not bound by MSHA's proposed initial "single penalty assessments" of $20 for each of the violations in question. Pursuant to section 110(i) of the Act, penalty assessments imposed by the Commission's judges in a contested case docketed before the Commission, are based on the judge's de novo consideration of all of the facts and circumstances surrounding the cited conditions or practices, as well as the six statutory criteria set forth in the Act.

any given case. Further, based on my consideration of the evidence and testimony of record, I may also accept or reject the findings by the inspector that the violations were not "significant and substantial," and may modify the citations to reflect these de novo findings.

When asked to explain why he did not consider the cited conditions or practices to be "significant and substantial," inspector Boyle responded as follows (Tr. 37):

> MR. ZOHN: And I believe, and of course, Mr. Boyle could correct me if I'm wrong, he saw the bulldozers on the floor of the pit, rather than on the ramp. And, that the danger of overturning, in almost all cases, is when they push up onto the open, up onto the ramp and as they're backing down onto the open side, they have a tendency to back down faster, so, that's the greatest danger of overturning, is when they are operating on the ramp, which is a common occurrence, or a frequent occurrence, operating in the pit.
>
> JUDGE KOUTRAS: All right. Now, if that's the case, then, again, why wouldn't these be significant or substantial?
>
> MR. ZOHN: Well, that was one of my questions, following up.
>
> BY MR. ZOHN:
>
> Q. If you had to cite these conditions over again, would you have cited them as non S and S, or would you have given them a higher degree of danger?
>
> A. Well, there again, if those two bulldozers were working where there was a definite time that there would be an overturn, say both of them were coming down the ramp, you could make them S and S, then, yeah.
>
> Q. So, in operating on--

JUDGE KOUTRAS: I may have been the Judge that did that to you; but, anyway go ahead.

THE WITNESS: But, anyhow, they say, well, you cited them for say, a backup alarm, and there was no one in the area, there was never a hazard, and you made it S and S. But a lot of inspectors base that, the afternoon shift, he may be working in an area where's six people involved. So we cited him in the spoils for a non S and S citation, and that afternoon, he'd be in an area where there would be other equipment and people involved. So, you have to draw the line, and see where this equipment is working and the potential, that, afternoon you definitely know he'll be in another area. So there's where, I think, this whole thing on this S and S, and non S and S, has really confused a lot of us.

BY MR. ZOHN:

Q. I, another question, in that respect, of the classification of these violations; do you, in fact, now have the opportunity to inspect this mine as frequently as you did, say--

A. No. See, there's another thing that certain type mines are getting in, what we refer to, as a pattern on these two inspections a year now. They'll look at their calendar and say, well, it's April, he's due, and we'll fix things up; where the other five months of the year, he won't. And it's really hurt the safety and health part of it, on these only two inspections.

* * * * * *

BY MR. ZOHN:

Q. Okay. So were these bulldozers operating on the ramp, during the course of that day? Would they be operating on--

THE WITNESS: One was, and then, the other was ripping, and then, when he gets so much ripped, then they'd both be pushing off this.

JUDGE KOUTRAS: Okay.

BY MR. ZOHN:

Q. Did you see them operating up on the incline, at all?

A. Yeah.

Q. All right. Based upon your observations of them operating on the incline, would you have issued them now as S and S citations?

A. I'd have to check the area first, and see how much of a danger there was. Now, these can be, these ramps can be anywhere from forty foot wide to seventy foot wide, and if they're both going up the middle, there is no danger there, but one time or another, the ones on the edge, there is a danger there then.

MR. ZOHN: I don't have any further questions, your Honor.

JUDGE KOUTRAS: Okay. What the, do you recall what the widths of the ramps were, on these days?

THE WITNESS: I think those, the ramps, that day, were in the neighborhood of forty to fifty feet wide.

Significant and Substantial

On the facts of this case, I conclude and find that the violations cited by Inspector Boyle were significant and substantial. His testimony is that the two bulldozers operated on a daily basis in the pits, and while it is true that at the time he observed them they were running on fairly level terrain, he also indicated that they traveled up and

doors, the lack of proper latches, and one or more missing handles, would likely trap the operators in the cabs in the event the equipment overturned, and that they would have difficulty in getting out of the equipment. Given these circumstances, I conclude and find that it was reasonably likely that an injury would result from the cited conditions or practices. Accordingly, the violations are modified to reflect that they were significant and substantial, and the inspector's initial findings to the contrary are rejected.

Gravity

I find that all of these citations constitute serious violations. Failure to provide seatbelts and the lack of door handles on the operator's cab, presented a serious hazard to the equipment operator in the event of an accident. If the bulldozers were to overturn, the lack of seatbelts would likely throw the operators out of the cab, and the lack of adequate door handles would prevent their escape from the vehicles in the event of an emergency, particularly if the overturned equipment were to come to rest on the one "good-side" of the cab.

Negligence

Inspector Boyle believed that the respondent's negligence with respect to the condition of the doors on the cited bull-dozers was moderate. He stated that with the older bulldozers, while it was difficult to obtain parts such as door handles, he still allowed them to be operated (Tr. 34; 36). Mr. Boyle also confirmed that the foreman was aware that seatbelts were required (Tr. 29). I conclude and find that the violations resulted from ordinary negligence on the part of the respondent.

Good Faith Compliance

Inspector Boyle confirmed that abatement was achieved in a timely manner by the respondent, and the door handles were replaced (Tr. 29; 34-36). He also confirmed that seatbelts were installed. Under the circumstances, I conclude and find that the respondent timely abated the cited conditions and

the period May 16, 1981, through May 15, 1983, respondent was assessed for two citations, and they remain unpaid.

Based on the respondent's past compliance record, as reflected in the print-outs, I cannot conclude that it is per se a bad record of compliance warranting additional increases in the civil penalties which I have assessed for the four violations which have been affirmed. What I have difficulty comprehending is why this respondent, with an otherwise good compliance record, consistently ignores and flaunts the law after he has abated the conditions, and seeks to be heard through the hearing process.

Size of Business and Effect of Civil Penalties on The Respondent's Ability to Continue in Business

The record reflects that the respondent is a small strip mine operator. Absent any evidence to the contrary, and in view of the respondent's failure to appear and argue otherwise, I cannot conclude that the civil penalties assessed by me for the citations which have been affirmed will adverse affect the respondent's ability to continue in business.

During his closing argument on the record, petitioner's counsel requested a substantial increase in the initial pena assessments proposed for these violations, and he did so on basis of the evidence and testimony which indicated that the bulldozers in question were operating in areas where there was a danger of overturning, that no seatbelts at all were provided, and that the lack of adequate door handles and latches would entrap the operators if the vehicles were to overturn. Counsel also agreed that I was not bound by the initial MSHA assessments made for these violations, and he alluded to the fact that the respondent has a history of flaunting the law (Tr. 47-48).

Petitioner's counsel also moved that in view of the failure of the respondent or his counsel to appear in this proceeding, that I refer the matter to the Commission for appropriate disciplinary action pursuant to the Commission's rules. In support of his motion, counsel argued that the respondent has an obvious contempt for these proceedings, th this is not the first time he has failed to appear at a

respondent has made no payments for any civil penalties ordered by the Commission Judges in past proceedings, and that the Department of Labor has sought injunctions against the respondent for non-payment of penalties in the United States District Court (Tr. 12-15; 48-50). Petitioner's counsel also stated that the respondent and his foremen treat MSHA inspectors with general disrespect and that the respondent attempts to avoid the law rather than obey it (Tr. 16).

In support of his assertion that the respondent has flagrantly disregarded the authority and jurisdiction of the Commission, petitioner's counsel alluded to several prior decisions and orders issued by me, by Chief Judge Merlin, and Judges Broderick and Melick, and a discussion of these follow below:

In MSHA v. Getz Coal Sales, Inc., VINC 79-60-P, decided by me on August 7, 1980, 2 FMSHRC 2172, respondent Roland Getz failed to appear at a hearing convened in Warren, Ohio, and he did so without prior notice that he would not appear. He simply ignored the notice, and my personal telephone call to him the morning of the hearing. In that case, he specifically requested a hearing, and did not even give me the courtesy of a telephone call that he would not appear. He was defaulted, and an order was entered that he pay the assessed civil penalty of $75.

In MSHA v. Getz Coal Sales, Inc., LAKE 80-396, Judge Broderick entered a default order on February 9, 1981, requiring the respondent to pay a penalty of $26 for his failure to file an answer or otherwise respond to the Judge's show-cause order. Judge Merlin issued a similar default order on May 13, 1983, in MSHA v. Getz Coal Sales, Inc., LAKE 83-4, and ordered the respondent to make an immediate payment of $46.

In MSHA v. Getz Coal Sales, Inc., LAKE 83-86, Judge Melick approved a settlement motion calling for the respondent to pay a $30 assessment in satisfaction of a citation initially assessed as $42, and in that case, as well as the others noted above, petitioner's counsel states that respondent [illegible] payments, and has simply ignored the

and his counsel received notice of the hearing scheduled i
this case, and the postal certified mailing receipts which
are part of the record attest to that fact. Respondent re
my original hearing notice issued on January 16, 1984, and
counsel received the amended notice issued March 22, 1984,
advising him of the specific hearing site. These notices
issued well in advance of the scheduled hearing on April 1
1984.

In addition to the written notices served on the respondent and his counsel, petitioner's counsel advised m that he personally spoke with respondent's counsel on the before the hearing and advised him that he should appear. When counsel failed to appear the morning of the hearing, personally telephoned his office and was advised by his clerical staff that he was away, but that he was aware of the fact that this matter was scheduled for hearing. Give these circumstances, it seems clear to me that respondent its counsel had ample notice of the hearing, yet they flagrantly ignored the notices and orders.

Although respondent Roland Getz has a history of obvi contempt for these legal proceedings, and apparently deriv some vicarious pleasure by thumbing his nose at the Depart of Labor, as well as the Commission, I fail to understand comprehend counsel Neal S. Tostenson's conduct in ignoring notices served on him in this proceeding. As a member of Bar, I would think that he would be cognizant of his ethic responsibilities as counsel of record in these proceedings act accordingly. If counsel conducted his practice in thi manner while before a United States District Court, he wou more than likely find himself in contempt of court. Lacki such contempt powers, I do have the discretion to certify matter to the Commission for possible disciplinary action its rules, and I may also consider referring the matter to local bar where counsel is admitted to practice.

After careful consideration of the motion made by petitioner's counsel to certify this matter, IT IS GRANTED and the matter will be certified to the Commission for con eration of appropriate disciplinary action under 29 C.F.R. 2700.80.

the Act, I conclude and find that the following civil
alties are reasonable and appropriate for the violations
ch have been affirmed.

tation No.	Date	30 CFR Section	Assessment
57133	5/16/83	77.1710(i)	$135
57134	5/16/83	77.1606(c)	175
57135	5/16/83	77.1710(i)	135
57136	5/16/83	77.1606(c)	175
			$620

ORDER

Respondent IS ORDERED to pay the civil penalties in the unts shown above within thirty (30) days of the date of this ision, and payment is to be made to MSHA.

IT IS FURTHER ORDERED THAT:

In view of the circumstances surrounding the respondent's apparent flagrant disregard for the authority and jurisdiction of the Commission, and in view of Counsel Neal S. Tostenson's failure to appear at the scheduled hearing pursuant to notice duly served on him, the matter is referred to the Commission pursuant to Rule 80, 29 CFR 2700.80. See: Secretary of Labor ex rel. Roy A. Jones v. James Oliver & Wayne Seal, FMSHRC Docket No. NORT 78-415, March 27, 1979; Canterbury Coal Co., 1 FMSHRC 335 (May 1979); Secretary of Labor v. Co-Op Mining Company, 1 FMSHRC 971 (July 1979) (Disciplinary Proceeding No. D-79-2).

George A. Koutras
Administrative Law Judge

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Bldg., 1240 E. 9th St., Cleveland, OH 44199 (Certified Mail)

Neal S. Tostenson, Esq., Georgetown Bldg., Georgetown Rd., P.O. Box 447, Cambridge, OH 43725 (Certified Mail)

Mr. Roland A. Getz, President, Getz Coal Sales, Inc., 8310 Hoffee Road, Lisbon, OH 44432 (Certified Mail)

/cjp

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. CENT 83-65
Petitioner	:	A.C. No. 29-00096-03506
v.	:	
	:	McKinley Mine
THE PITTSBURG & MIDWAY COAL MINING CO.,	:	
Respondent	:	

DECISION

Appearances: Jordana W. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John A. Bachmann, Esq., Denver, Colorado, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for one alleged violation of a mandatory standard, that contained in 30 C.F.R. § 77.202. Pursuant to notice, the case was heard in Albuquerque, New Mexico on April 17, 1984. Forester Horne and Harold Shaffer testified on behalf of Petitioner, and Petitioner called Frank Scott, a representative of Respondent as a witness. Frank Scott and Gary Cope testified on behalf of Respondent. At the conclusion of the testimony, counsel orally argued their respective positions on the record, and waived their right to file post-hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of a surface coal mine in McKinney County, New Mexico, known as the McKinney Strip Mine.

Respondent's ability to continue in business.

5. On June 9, 1983, Federal Mine Inspector Forester Ho inspected the subject mine and issued Citation No. 2071336 alleging a violation of 30 C.F.R. § 77.202.

6. The tipple control room at the subject mine is on t top floor of the coal transfer building and is about 80 feet from the surface. The coal comes in the transfer building a its transferred to the stacker belt. Coal dust results from this operation.

7. The tipple control room is about 20 feet by 15 feet It contains two panels or boxes, one known as the main crush panel or main breaker box, and the other called the heat tra box or panel. The former is about 6 feet high and 2 feet wi The latter is about 2 feet by 2 feet.

8. The main crusher panel contains a motor starter, wi an overload relay, a transformer and numerous wires.

9. The heat trace panel contains a number of circuit breakers.

10. On June 9, 1983, there was an accumulation of coal dust in the main crusher panel and the heat trace panel. Th dust on the base of each panel measured approximately one-ei of an inch. It was black in color. There was dust on the equipment within each box although most of it had settled to base. The dust was not in suspension.

11. The dust had come up through the floor of the roon around the conduits under the panels.

12. The condition described in Finding No. 10 was such that it would have taken 2 to 3 days to accumulate. It was apparent to visual observation.

13. In the normal operation of the main crusher panel the heat transfer panel, no ignition source, arc or spark is created.

ULATION

30 C.F.R. § 77.202 provides as follows: "Coal dust in the of, or in, or on the surfaces of, structures, enclosures, Other facilities shall not be allowed to exist or accumulate dangerous amounts."

JES

1. Whether Respondent allowed coal dust to exist or umulate in dangerous amounts in the panels in the tipple crol room of the subject mine on June 9, 1983?

2. If so, what is the appropriate penalty for the lation?

CLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal e Safety and Health Act of 1977 in the operation of the ject mine, and I have jurisdiction over the parties and ject matter of this proceeding.

2. The condition described in Finding of Fact No. 10 stituted a violation of the mandatory safety standard con- ned in 30 C.F.R. § 77.202.

CUSSION

The critical issue in this case is whether the coal dust umulations existed "in dangerous amounts." There are few es interpreting this phrase. But see Consolidation Coal pany, 3 FMSHRC 318 (1981) (ALJ); Secretary v. Co-op Mining pany, 5 FMSHRC 1041 (1983) (ALJ). Whether an accumulation angerous depends upon the amount of the accumulation and existence and location of sources of ignition. The greater concentration, the more likely it is to be put into suspen- and propogate an explosion. I accept the inspector's timony as to the amount of the accumulation and conclude that as significant. It is true that there were no bare wires ny equipment that would cause arcing or sparking without equipment failure or defect. But there was energized

5. The violation was abated promptly and in good fait

6. Considering the criteria in section 110(i) of the
I conclude that an appropriate penalty for the violation is
$400.

ORDER

Based upon the above findings of fact and conclusions
law, Respondent is ORDERED to pay the sum of $400 within 30
of the date of this decision for the violation found herein
have occurred.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Jordana W. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Suite 501 Dallas, TX 75202 (Certified Mail)

John A. Bachmann, Esq., The Pittsburg & Midway Coal Mining Company, 1720 South Bellaire Street, Denver, CO 80222 (Certified Mail)

/fb

RETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	Docket No. KENT 83-248
Petitioner	:	A. C. No. 15-13881-03504
	:	
v.	:	Docket No. KENT 84-72
	:	A. C. No. 15-13881-03514
D MINING COMPANY,	:	
Respondent	:	Pyro No. 9 Slope
	:	William Station
	:	
	:	Docket No. KENT 84-71
	:	A. C. No. 15-11408-03518
	:	
	:	Pride Mine

DECISION

arances: Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
William M. Craft, Assistant Safety Director, Sturgis, Kentucky, for Respondent.

re: Judge Steffey

A hearing was convened in the above-entitled proceeding on uary 28, 1984, in Evansville, Indiana, pursuant to section d), 30 U.S.C. § 815(d), of the Federal Mine Safety and th Act of 1977.

The parties were given an opportunity to discuss settle- prior to the convening of the hearing. As a result of r discussion, a settlement of all issues was achieved. Un- the parties' settlement agreement, respondent will pay re- d penalties totaling $734 instead of the penalties totaling 84 proposed by the Mine Safety and Health Administration. aspects of the parties' settlement agreement are unique in the parties asked me to modify a citation issued under sec- 104(d)(1) to a citation issued under section 104(a), as inafter fully explained.

business.

Respondent did not present any evidence at the hearing pe taining to its financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that if an operato fails to introduce any data pertaining to its financial condition, a judge may presume that the operator is able to pay pen alties. In the absence of any information in the record to su port a contrary conclusion, I find that payment of penalties will not cause respondent to discontinue in business and that is unnecessary to reduce any penalties because of the operator financial condition.

All of the proposed assessment sheets indicate that, duri the 24 months preceding the citing of the violations alleged i this consolidated proceeding, respondent was cited for such a few violations of the mandatory health and safety standards, that MSHA assigned zero penalty points under the penalty asses ment formula described in 30 C.F.R. § 100.3(c). Therefore, no penalty assessed in this proceeding needs to be increased unde the criterion of respondent's history of previous violations.

Each of the proposed assessment sheets shows, with one ex ception, that all assessments proposed by MSHA have been reduc by 30 percent pursuant to section 100.3(f) because respondent demonstrated a good-faith effort to achieve compliance within the time for abatement given by the inspectors in their cita- tions. The one exception occurred with respect to Citation No 2337388 and special circumstances pertain to that citation as hereinafter explained.

The above discussion of four of the six criteria is appli cable to all penalties proposed by MSHA in this proceeding. T remaining two criteria of negligence and gravity are hereinaft considered in an evaluation of each violation alleged in each docket number.

Docket No. KENT 83-248

The proposal for assessment of civil penalty in Docket No KENT 83-248 seeks to have penalties assessed for three alleged violations. Citation No. 2217774 alleged a violation of secti

were needed because of the adverse conditions which existed in the area. The Assessment Office considered the violation to have been moderately serious, to have been associated with a low degree of negligence, and proposed a penalty of $50 which respondent has agreed to pay in full (Tr. 4). Inasmuch as the roof had been resupported after the roof fall, but had not been supported as well as the inspector believed to be desirable, it appears that the Assessment Office proposed a reasonable penalty and that respondent's agreement to pay the full amount should be approved.

Citation No. 2217821 alleged a violation of section 75.1303 because a misfired shot had not been removed from the left rib of the No. 1 entry before mining was conducted inby the misfired shot. The Assessment Office considered the violation to have been moderately serious, to have been associated with a low degree of negligence, and proposed a penalty of $50 which respondent has agreed to pay in full (Tr. 4). I would normally expect the failure to remove a misfired shot to be a more serious violation than it was considered to be in this instance, but the Assessment Office assigned penalty points under section 100.3 for the criteria of negligence and gravity exactly as those criteria had been evaluated by the inspector who wrote the citation. The inspector was present when the misfired shot was removed and was in a position to observe the circumstances surrounding the violation better than anyone else. In such circumstances, I find that the penalty was properly proposed and that respondent's agreement to pay the full amount should be approved.

Citation No. 2217824 alleged a violation of section 75.202 because brows in the vicinity of overcasts in the track, belt, and return entries needed additional support. The Assessment Office considered the violation to have been moderately serious, to have been associated with ordinary negligence, and proposed a penalty of $74 which respondent has agreed to pay in full (Tr.). The Assessment Office assigned penalty points in accordance with the evaluation made by the inspector who wrote the citation. He was in a position to determine the seriousness of the violation and to appraise the operator's degree of negligence. Therefore, I find that the penalty was properly proposed and that respondent's agreement to pay the penalty in full should be approved.

The proposal for assessment of civil penalty filed in Do
ket No. KENT 84-72 seeks assessment of penalties for six alle
violations of the mandatory health and safety standards. Two
of the citations (Nos. 2337926 and 2337927) alleged violation
of section 75.400. The Assessment Office assigned penalty
points in accordance with the inspector's evaluation of negli
gence and gravity. The inspector considered the violation al
leged in Citation No. 2337927 to be more serious than the one
alleged in Citation No. 2337926 because he believed that the
loose coal accumulations described in Citation No. 2337927 ex
posed more persons to injury than the accumulations describe
in Citation No. 2337926. The inspector considered that both
violations were associated with ordinary negligence. Respond
has agreed to pay in full the proposed penalties of $74 and $
for the violations alleged in Citation Nos. 2337926 and 2337
respectively. I find that the penalties were properly propos
and that respondent's agreement to pay the penalties in full
should be approved.

Citation No. 2337929 alleged a violation of section 75.5
because the insulation on the trailing cable to the cutting
machine had been damaged sufficiently to expose bare conducto
wires. The inspector considered the violation to have been
serious and to have been associated with a high degree of neg
ligence. His evaluation resulted in a proposed penalty of $1
under the assessment formula in section 100.3. Respondent ha
agreed to pay the proposed penalty in full (Tr. 8). I find t
the penalty was properly proposed and that respondent's agree
ment to pay the penalty in full should be approved.

Respondent's answer to the Secretary's proposal for asse
ment of civil penalty filed in Docket No. KENT 84-72 withdrew
respondent's request for a hearing with respect to the violat
of sections 75.604 and 75.701 alleged in Citation Nos. 233794
and 2337945, respectively. Respondent's withdrawal of its re
quest for hearing has the technical effect of leaving the mat
before me for approval because section 110(k) of the Act pro-
vides that a proposed penalty which has once been contested s
as to bring it before the Commission cannot be compromised,
mitigated, or settled without the approval of the Commission
Both of the violations pertained to creation of shock hazards

ent has agreed to pay in full (Tr. 7). I find that the penalties were properly proposed and respondent's agreement to pay the penalties in full should be approved.

The final violation to be considered in Docket No. KENT 84-72 is a violation of section 75.316 alleged in Citation No. 2337388 which was written pursuant to the unwarrantable-failure provisions of section 104(d)(1) of the Act. The Assessment Office waived application of the penalty formula described in section 100.3 with respect to the violation alleged in Citation No. 2337388 and proposed a penalty of $1,000 on the basis of narrative findings written pursuant to section 100.5. At the hearing, counsel for the Secretary of Labor stated that he had discussed with the inspector who wrote Citation No. 2337388 the conditions surrounding his writing of the citation and the Secretary's counsel said that the citation incorrectly implies that the cutting machine was not equipped with water sprays when, in fact, it was so equipped. The Secretary's counsel also stated that respondent's management was in the process of advancing the waterline at the time the citation was written. Additionally, the Secretary's counsel stated that, while the ventilation and dust control plan does specify that the cutting machine has to be equipped with four water sprays, the plan does not specifically state that the machine can be used only if the waterline is connected to the machine.

The Secretary's counsel stated that even though it would make little sense to have water sprays on a machine without having them connected to a waterline, he believed the ambiguous wording of the plan had caused the violation to be rated as much more serious than it was. In such circumstances, the Secretary's counsel moved that I modify the citation to a citation written pursuant to section 104(a) of the Act and that the modified citation should be written without checking the block on the face of the citation indicating that the violation was a significant and substantial violation (Tr. 9-11).

I believe that the Secretary's counsel provided sufficient reasons to justify the grant of his motion that I modify Citation No. 2337388 from one issued pursuant to section 104(d) to a citation issued pursuant to section 104(a). The inspector who wrote the citation did not consider the violation to have

the ventilation and dust control plan contains ambiguous language which makes it inappropriate to find that respondent's management was necessarily indifferent or showed a lack of due diligence in having the cutting machine connected to the water line, I believe that the citation was improperly issued under the unwarrantable-failure provisions of the Act and that the citation should be modified, as hereinafter ordered, to a citation issued under section 104(a) of the Act.

When the parties stated that they had not agreed upon a specific penalty for the alleged violation of section 75.316, but had only agreed that the citation should be modified to a citation issued pursuant to section 104(a) without a designation of significant and substantial, I noted that I had written a decision 1/ in which I held that the Commission and its judges are not bound by the provisions of section 100.4 2/ so as to be required to assess a penalty of only $20 if we have before us a civil penalty proceeding involving a citation issued under section 104(a) without a designation that the violation is significant and substantial. 3/

Citation No. 2337388, as modified, cites a violation of section 75.316 because the cutting machine was being used without having the waterline connected to it. The parties have stipulated that the violation was not significant and substant

1/ U. S. Steel Mining Co., Inc., Docket Nos. WEVA 82-390-R, et al., issued April 30, 1984, pages 19-25.

2/ 30 C.F.R. § 100.4 provides, in pertinent part, as follows: "An assessment of $20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. * * *"

3/ The Commission held in Consolidation Coal Co., 6 FMSHRC 189 (1984), that MSHA's inspectors may designate on a citation written pursuant to section 104(a) of the Act that a violation is "significant and substantial". That phrase is derived from section 104(d)(1) of the Act which specifies that an inspector must find that any violation cited pursuant to section 104(d) "* * * is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard * * *"

very small portion of the penalty should be assessed under the criterion of gravity. Most of the penalty should be assessed under the criteria of the operator's size and the fact that ordinary negligence must be considered to have been associated with failure to attach the waterline prior to using the machine even if the ventilation plan did not specifically state that attachment of the waterline was a prerequisite for using the machine to cut coal. I have previously stated above that no penalty in this proceeding should be increased under the criterion of history of previous violations. The penalty should not be increased under the criterion of good-faith abatement because the violation was corrected within the 30-minute period allowed for abatement by the inspector. Therefore, I believe that a penalty of $50 should be assessed for the violation of section 75.316 alleged in Citation No. 2337388.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The parties' motion for approval of settlement is granted and the settlement agreement is approved.

(B) The motion made by counsel for the Secretary of Labor for modification of Citation No. 2337388 is granted and Citation No. 2337388 dated August 19, 1983, is modified to a citation issued under section 104(a) of the Act without a designation of significant and substantial.

(C) Pursuant to the parties' settlement agreement and the grant of the parties' other requests in this proceeding, Pyro Mining Company shall, within 30 days from the date of this decision, pay civil penalties totaling $734.00 which are allocated to the respective alleged violations as follows:

Docket No. KENT 83-248

Citation No. 2217774 4/18/83 § 75.202	$ 50.00
Citation No. 2217821 4/20/83 § 75.1303	50.00
Citation No. 2217824 4/22/83 § 75.202	74.00
Total Settlement Penalties in Docket No. KENT 83-248	$174.00

Docket No. KENT 84-71

Citation No. 2337944	10/25/83	§ 75.604		74.00
Citation No. 2337927	10/26/83	§ 75.400		91.00
Citation No. 2337945	10/27/83	§ 75.701		74.00
Citation No. 2337929	10/28/83	§ 75.517		112.00
Total Settlement and Assessed Penalties in Docket No. KENT 84-72				$475.00
Total Settlement and Assessed Penalties in This Proceeding				$734.00

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

Distribution:

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 80-312-M
v.	:	A.C. No. 29-00166-05005
	:	Nash Draw Mine
DUVAL CORPORATION, Respondent	:	

DECISION

Appearances: Eloise V. Vellucci, Esq., Office of the Solici
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Lina S. Rodriguez, Esq., Bilby, Shoenhair,
Warnock & Dolph, Tucson, Arizona,
for Respondent.

Before: Judge Morris

This case, heard under the provisions of the Federal Mi Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose from an inspection of respondent's Nash Draw M The Secretary of Labor seeks to impose civil penalties becau respondent allegedly violated two safety regulations promulg under the Act.

Respondent denies that any violations occurred.

After notice to the parties, a hearing on the merits wa held in Carlsbad, New Mexico on November 2, 1983.

The parties filed post trial briefs.

Issues

The issues are whether respondent violated the regu- lations; if so, what penalties are appropirate.

Stipulation

57.11-50.

Citation 162288 provides as follows:

> 57.19-120 Mandatory. A systematic procedure of inspection, testing, and maintenance of shaft and hoisting equipment shall be developed and followed. If it is found or suspected that any part is not functioning properly, the hoist shall not be used until the malfunction has been located and repaired or adjustments have been made.

Citation 162289, provides as follows:

> 57.11-50 Mandatory. Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore bod
>
> In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his work place.

Summary of the Evidence

MSHA's evidence: Sidney Kirk, a supervisory mine inspector testified for MSHA (Tr. 14-17).

At approximately 11:30 a.m. on January 9, 1980 Inspector Kirk received a call from Marvin Nichols, his supervisor. The supervisor advised him that respondent was having hoisting control problems on the No. 5 hoist at the Nash Draw mine. Nichols had told the company the oncoming miners should not go underground until the malfunction was corrected (Tr. 18). In t

automatic speeds (Tr. 20, 22, 30). Ore speed is automatic a
much faster. Man speed requires manual control. The hoist
control system permits the operator to twist a handle to conv
to man from ore speed (Tr. 20). Man speed runs about 650 fee
per minute. This is about 200 to 250 feet per minute slower
ore speed (Tr. 19, 20). McGraw felt he was in compliance wit
the regulations because there were ladderways in each shaft.
They could be used as an escape device from the 900 foot leve
(Tr. 21).

At Kirk's request the skif was automatically loaded. Wh
the hoistman applied power to raise the skif it started creep
down. Brakes were required. In the meantime the company
electricians continued checking various components in the con
box cabinet (Tr. 22, 23).

MaGraw declined to bring the miners out without an MSHA
order. Kirk obliged. The citation issued at 1737 hours stat
respondent was in violation of Section 57.19-120 (Tr. 23-25,
Exhibit C2). The company was cited because if a fire or a
blowout occurred underground, a second escapeway was not
available. After the inspector arrived at the mine the compa
contended the hoist would operate on manual. But it went
backwards instead of coming up the shaft (Tr. 26, 27).

The hoisting logs reflected these malfunctions had been
occurring since about 2 a.m., on January 8. (Tr. 27, 28). Th
had been a full shift on January 9 and the company was 3 to 4
hours into the afternoon shift when the imminent danger order
issued (Tr. 27, 28).

The other mine shaft, the regularly used man shaft, incc
porates the exhaust ventilation system. In the event of an
underground catastrophe, such as a detonation, fire, or smoke
cumulation or blowout the 13 or 15 miners could not exit via
intake shaft because of the hoist malfunction (Tr. 28, 29, 35

Citation 162289 was issued because respondent did not ha
second escapeway since the hoist was inoperative (Tr. 30-33).
Management contended the ladders furnished the second escapew

correctly. The inspector modified the citation to permit
miners to go underground to load the skif so it could be t
The citation was terminated at 2 a.m. the following day (T
40, 64, 67).

The inspector did not observe any miners being hauled
the No. 5 hoist. Nor was any attempt made to do so. The
were brought out via the No. 6 shaft after the imminent da
order was issued (Tr. 53, 62). The statutory definition o
imminent danger is contained in 30 U.S.C. 802(j). The wit
order was issued here because of the electrical problems.
the miners were underground there was but a single exit (T

MSHA's policy is this: If a malfunction occurs, they
allow the shift below to stay underground provided the min
not open any new ground. But the policy prohibits the nex
from going underground. The miner's representative must c
in any decision of the miners to remain underground (Tr. 6

Norman Gonder, John Solar, John Magraw, Jack Hunt, an
Awbrey testified for respondent.

The Nash Draw mine, an underground potash mine, is mi
the roof and pillar method. The potash exists in a salt
formation. The formation is relatively safe since the pot
in a noncombustible ore body. In addition the formation i
non-gassy, is without water, and requires no timbers for s
While the mine has won safety awards there have been roof
blowouts and fatalities at the mine (Tr. 77, 78, 100, 101)

The hoists (No. 5 and No. 6) are in separate shafts a
300 feet apart. The No. 5 is a counterbalance system with
separate hoist conveyances (Tr. 87-89, 95, 96, Exhibit R2A,
The No. 6 shaft is large enough to accommodate a vehicle (
93).

The shafts extend as deep as the 900 foot level. To
the ore a miner goes down two more slopes, an additional 1
vertical feet (Tr. 98).

In July 1983 Warren Traweek, the 40 year old assistan
safety director climbed out of the mine via the ladders.

John Solar, respondent's electrician, and others sta
working on the No. 5 hoist when it broke down. He worked
and part of the next night to correct the malfunction (Tr.
110-112). The malfunction of No. 5 did not affect the No.
hoist. The hoists are controlled by separate motors (Tr.
111,112). In checking the system Solar had to occasionall
off the power. Solar never permitted anyone to operate th
equipment while they were checking it (Tr. 113-115, 124).
Escapeways include the No. 6 hoist and the ladders in the
and No. 6 shafts (Tr. 114).

On the day the citation was issued there was no fire
underground nor were any miners in danger (Tr. 115, 116).
identified respondent's weekly maintenance log on the No.
(Tr. 117, 118, 123, Exhibit R9). The hoistman checks out
ment and Solar performs the maintenance. A mechanic also
performs various periodic equipment checks (Tr. 119, 120).

The No. 5 hoist would still run by hand controls and
could be brought out with that control. But the hoist wou
run right on automatic (Tr. 125). If a malfunction occurr
on automatic you could turn it off by hand (Tr. 125). Mir
could still be brought out if you were operating it by har
125, 128). The hoist was not malfunctioning other than wh
was in the automatic mode (Tr. 128).

John Magraw, respondent's manager for mine developmer
not prohibit the 3 p.m. shift from going underground (Tr.
He felt there was no danger to the miners (Tr. 134, 135).

Jack H. Hunt, respondent general superintendent, was
they were having intermittent hoist problems. He called t
Dallas office about 11:00 a.m. (Tr. 142-145). Marvin Nich
(MSHA) told Hunt it is normal procedure to finish the shif
worked but not to lower the next shift (Tr. 146). About 3
p.m. Hunt directed that Sid Kirk, at MSHA's local office,
advised of the situation (Tr. 147). Hunt and Kirk discuss
hoist problem. Kirk was displeased that the second shift
gone underground (Tr. 149).

At no time did Hunt see any miners being hauled by th
hoist (Tr. 153).

Harry Awbrey, respondent's chief electrician, didn't find too much wrong with the electrical equipment. He checked the directional relays and latched them back. Except for low volta the equipment seemed normal (Tr. 182, 183).

The No. 5 hoist operates on DC current. This automatic static regulated hoist is exceedingly complicated. In contrast the No. 6 hoist operates on AC current and requires lower volta than the No. 5 hoist (Tr. 184).

It was established that the problem was not with the hoist but with the incoming Public Service Company voltage from a temporary transformer. The No. 5 hoist is so sensitive that it triggered out from the voltage drop when the current fluctuated Hoist No. 6 is not as sensitive. Public Service Company replac the temporary transformer with a permanent one (Tr. 186-188).

Discussion

As a threshold matter respondent contends that by virtue o 30 C.F.R. § 57.19 no violation of § 57.19-120 can be sustained. In short, respondent claims that Citation 162288 must be vacate

The regulation relied on by respondent reads:

> § 57.19 Man hoisting.
>
> The hoisting standards in this section apply to those hoists and appurtenances used for hoisting persons. However, where persons may be endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied.
>
> Emergency hoisting facilities should conform to the extent possible to safety requirements for other hoists, and should be adequate to remove the persons from the mine with a minimum of delay.

Respondent's argument lacks merit. While the No. 5 hoist primarily a production hoist it is uncontroverted that the hois had been identified as a "second escapeway" in the company's

continued through the night of January 9, and when he issued MSHA withdrawal order the company was 3 to 4 hours into the afternoon shift (Tr. 27, 28).

This evidence is further confirmed by the obvious fact t a production crew and a preparation crew were underground whe the withdrawal order was issued. But when Inspector Kirk wan to test the hoist at 9 p.m. on January 9 there was no availab ore. It was then necessary to modify his withdrawal order to permit four employees to go below to muck the ore so the hois could be loaded and retested. The ore had no doubt been remo by the No. 5 production hoist. In view of this finding I necessarily reject the company electrician's testimony to the contrary (Tr. 108, 112-114).

Exhibits R9, R10, and R11 do not assist respondent's position. These exhibits are copies of entries from notebook entitled "5 and 6 Hoist Log Book Electrical"; "Hoist Safety" "Hoist and Ropes-Log." Respondent's case is not aided becaus none of these exhibits reflect the use or non-use of the No. hoist during this incident. I particularly note that the inspector as well as the company's chief electrician referred the hoisting logs. The "records would show that it hoisted o (Tr. 27, 28, 195, 196).

Respondent's post trial brief pivots on certain facets. Initially, it is asserted that at no time during this inciden did any miners use the No. 5 hoist. I completely agree with respondent's statement of the evidence. However, Section 57.19-120 applies to any malfunction regardless of whether th hoist lifted miners.

Respondent's brief further asserts once it became appare that the hoist was malfunctioning it was not used for any pur other than testing. This point has been reviewed and ruled against respondent.

For the foregoing reasons I conclude that the hoisting regulation applies to respondent's production hoist. In addition, I find that the hoist was used in production before malfunction was located and repaired.

Citation 162288 should be affirmed

introduce any financial data a judge may presume that paym
a penalty will not cause the company to discontinue in bus
Buffalo Mining Company 2 IBMA 226 (1973); Associated Drill
Inc., 3 IBMA 164 (1974). The gravity of the violation was
severe since no miners used the No. 5 hoist. The Secretar
Office of Assessments did not credit respondent with any
statutory good faith. I concur in the disallowance of tha
credit. Respondent's evidence indicates that the hoist wa
malfunctioning the day after the inspection. Further, the
records would show they hoisted ore during this time (Tr.
196).

On balance I deem that the proposed penalty of $395 i
appropriate and it should be affirmed.

Citation 162289 alleges a violation of Section 57.11-

In essence the regulation requires that an operator s
maintain at least two separate escapeways. In addition, s
escapeways shall be so positioned that damage to one shall
lessen the effectiveness of the other.

The evidence established that there were two separate
escapeways in each shaft. The shafts were not interconnec
they were 300 feet apart. Accordingly, damage to one coul
lessen the effectiveness of the other.

The Secretary's post trial brief asserts that Section
57.11-50 must be construed in conjunction with Section 57.
which provides:

> 57.11-55 Mandatory. Any portion of a designated
> escapeway which is inclined more than 30 degrees
> from the horizontal and that is more than 300 feet
> in vertical extent shall be provided with an emer-
> gency hoisting facility.

The Secretary's argument runs along these lines: Sect
57.11-50 requires that the escapeways be "properly maintai
This means they must have an emergency hoisting facility.
the hoisting facility in the No. 5 shaft was not operative
violation occurred.

Consolidated Coal Co. v. Mine Workers, 3 FMSHRC 405 (1981) the designated escapeways were inadequate because of accumulated water, a faulty roof, and minimal clearance in the passageway. No such situation exists here.

The Secretary has failed to establish a violation of Section 57.11-50. Accordingly, Citation 162289 and all proposed penalties should be vacated.

Briefs

The solicitor and respondent's counsel have filed excellent detailed briefs which have been most helpful in analyzing the record and defining the issues.

In connection with Citation 162289 respondent's brief contains an extensive recital of the regulatory and legislative history of 30 C.F.R. 57.11-50. Since I do not find a violation of that regulation I do not reach that particular issue.

To the extent that the briefs here are inconsistent with this decision, they are rejected.

Order

Based on the findings of fact and conclusions of law stated herein, I enter the following order:

1. Citation 162288 and the proposed penalty of $395 are affirmed.

2. Citation 162289 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

blc

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 83-115
	:	A.C. No. 36-03425-03518
v.	:	
	:	Docket No. PENN 83-116
U.S. STEEL MINING COMPANY, INC.,	:	A.C. No. 36-03425-03519
Respondent	:	Docket No. PENN 83-148
	:	A.C. No. 36-03425-03525
	:	
	:	Docket No. PENN 83-155
	:	A.C. No. 36-03425-03526
	:	
	:	Docket No. PENN 83-156
	:	A.C. No. 36-03425-03527
	:	
	:	Docket No. PENN 83-157
	:	A.C. No. 36-03425-03528
	:	
	:	Maple Creek No. 2 Mine

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for violations of regulatory standards. The general issues before me are whether U.S. Steel Mining Company, Inc., (U.S. Steel), has violated the regulations as alleged, and, if so, whether those violations are of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or

Separate clamps were not provided for the electrical and frame grounds to attach the grounds to the DC grounding medium (mine rail), which were serving the two Ricks water pumps located along the Cherokee haulage at 40 split; the pumps were receiving power from the energized 550 volt DC trolley system. All four ground wires were attached to one clamp.

The cited standard provides as follows: "The attachment of grounding wires to a mine track or other grounded power conductor will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection."

Respondent does not dispute that a violation occurred as charged, but argues that the violation was not "significant and substantial." In order to establish that a violation of a mandatory safety standard is "significant and substantial" the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violations, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

According to Inspector Okey Wolfe of the Federal Mine Safety and Health Administration, (MSHA), the cited ground wires were attached to a single clamp which was, in turn, attached to the rail. Wolfe observed that such clamps may loosen from normal rail traffic and that in the event of a derailment would easily separate. He observed that should the clamp come off of the rail, the frames of both water pumps would become energized and an individual could be shocked or electrocuted. The hazard was increased by the wet conditions in the vicinity of the pumps.

Gary Stevenson, an electrical engineer for U.S. Steel testified that so long as all of the grounds were connected, there would be no hazard, but conceded that if any of those

Inasmuch as it required an affirmative act to connect the wires onto one clamp, and that this type of violation had been previously cited at this mine, I find that the operator was also negligent.

Docket No. PENN 83-116. Two citations were brought within this docket. Citation No. 2000148 charges a violation of the standard at 30 C.F.R. § 75.503 and specifically alleges as follows:

> Changes required to be made on six service machine 115 V.8.C. single phase control cable connector to maintain permissibility for the longwall mining system have not been made. A letter from Service Machine Company dated June 28, 1982, was sent to the mine advising them of the changes to be made. It cannot be verified whether management received notification or not.

MSHA Inspector James Potiseck conceded that he could not verify that the mine operator had received notice of the necessary modification either from MSHA or from the Service Machine Company prior to the issuance of his citation. Indeed, Potiseck admitted that the letter in evidence (Government Exhibit No. 9) supposedly informing U.S. Steel of the required changes was sent to the wrong address. The district electrical engineer for U.S. Steel, Gary Stevenson, testified that after receiving the citation, he had been unable to locate anyone who had received the noted letter.

Within this framework of evidence, it is clear that U.S. Steel did not receive notice of the change in the permissibility requirements for the cited longwall mining unit. Without such prior notice, there can be no violation. Accordingly, the citation is vacated.

Citation No. 2102668 alleges a violation of the standard at 30 C.F.R § 75.517 and charges specifically as follows:

> The trailing cable serving the Fletcher

The cited standard requires, as here relevant, that power wires and cables shall be insulated adequately and fully protected. According to Inspector Okey Wolfe, the ground wires could be seen inside of the cable jacket for the 4 inches that had not been taped. In addition, withi the taped area, one of the phase wires was exposed. The tape itself had also deteriorated exposing the ground wir According to Wolfe, the wires carried 440 volts alternati current and posed a shock hazard to persons handling the cable. Ordinarily, it would be necessary for a person to handle the cable as the roof bolter is moved to a new ent

According to U.S. Steel electrical engineer Gary Stevenson, no hazard exists so long as the inner insulati is intact. He also pointed out that the ground wires alo even if exposed, posed no hazard. Stevenson conceded, ho ever, that he did not know whether the inner insulation i the exposed area was in fact intact. Under the circum- stances I accept the testimony of Inspector Wolfe, who actually observed the exposed wires and the deteriorated condition of the trailing cable and I accordingly find th there was a "significant and substantial" violation of th cited standard. Mathies, supra. The testimony of Inspec Wolfe that the condition was not difficult to observe is undisputed and accordingly, I also find that the operator was negligent in failing to detect and correct the violation.

Docket No. PENN 83-148. U.S. Steel does not challen the existence of the violations charged in the two citati at issue in this case, but contests only the "significant and substantial" findings associated therewith. Citation No. 2011291 charges a violation of the operator's ventilt plan under the standard at 30 C.F.R. § 75.316. The citat reads as follows:

> There was a violation of the approved ventilation, methane, and dust control plan in No. 29 room of 6 Flat 28 room section. There were no jacks or boards and posts installed behind the canvas check in 29 room.

places." Samuel Cortis, U.S. Steel's district chief mine inspector, conceded that the cited temporary stopping was not supported as required by the plan and that some air was indeed escaping under the canvas curtain. He observed, however, that 8,400 cubic feet per minute of air was reaching the working face of the No. 31 room when only 5,000 cubic feet per minute was required by the ventilation plan.

MSHA Inspector Robert Swarrow conceded that although air was leaking through the cited stopping, more than the legally required amount of air was ventilating the working faces. Swarrow further conceded that any temporary stopping will leak some air and that stoppings are not required to be airtight. He nevertheless concluded that the violation was "significant and substantial" because "you might not get sufficient ventilation to clear the faces of methane gas." Methane testing at the time revealed no more than .5 percent methane present.

While there was admittedly a violation of the ventilation plan, since the amount of air reaching the working faces exceeded the requirements of the plan by 3,400 cubic feet per minute, I cannot find that the violation was either serious or "significant and substantial." If indeed more than 8,400 cubic feet per minute of air is deemed to be necessary for ventilating the working faces, then MSHA should require that the ventilation plan be amended to require that amount of air. The failure of the mine operator to have detected and corrected this violation during preshift examinations, demonstrates, however, that it was negligent.

Citation No. 2104283 alleges a violation of the standard at 30 C.F.R. § 75.503 and reads as follows: "The Kersey battery powered tractor at the 6 Flat 28 room section (ID002) was not being maintained in permissible condition. Locks were not being used to prevent the plugs from coming loose from the battery case." The parties stipulated and agreed at hearing that the facts concerning this alleged violation were nearly identical to the facts relating to a violation charged in another case pending before the undersigned judge (Docket No. PENN 83-166, Citation No. 2102678) and that the decision in that case should govern the disposi-

violation of the standard at 30 C.F.R. § 75.516 and alleges as follows: "The power wires serving power to the car spotter at 2 Flat tipple A track were in contact with combustible material as they were hung on wooden header blocks and wooden cribs [and were] also in contact with coal ribs and wires were energized." Respondent does not dispute that a violation occurred as charged but argues that it was not "significant and substantial."

According to MSHA Inspector Alvin Shade, there were no breaks in the wire insulation and no tension in the wire. There was, in addition, about 3 feet of clearance between the rail cars and the roof were the wire was strung. According to U.S. Steel District electrical engineer Gary Stevenson, the insulation on the wire was rated for 600 volts, whereas the wire itself was carrying only 120 volts. In addition, according to Stevenson, there was such low current in the wire that even assuming that the insulation had been removed, the heat generated would be about the same as an ordinary light bulb and therefore would be unlikely to ignite either coal or wood. This evidence is not disputed by MSHA and, accordingly, I find that the hazard associated with the admitted violation was minimal. The violation was not "significant and substantial." Mathies, supra. I find however, that the mine operator was negligent since the violation required an affirmative act and was plainly visible to a preshift examination.

Citation No. 2103073 alleges a violation of the standard at 30 C.F.R. § 75.503 and, more particularly, charges as follows: "The chain drive conveyor for the longwall in the 6 Flat 11 room section MRV001 was not maintained in permissible condition. There was an opening in excess of .005 in present between the plain flange joint of junction box for the electrical drive motor of the chain drive conveyor. The Respondent again does not dispute that a violation occurred as charged but argues that the violation was not "significant and substantial."

According to the undisputed testimony of MSHA Inspector Francis Wehr, there was indeed an opening in the junction box in excess of .005 of an inch. The box was located 8 to 10 feet from the longwall shear. According to his undis-

Mine foreman and longwall coordinator Joseph Hann testi fied for the operator that ordinarily 18,000 to 20,000 cubi feet of air per minute flushes the cited area of any methan In addition, according to Hann, there had never been any methane reported at the cited location. He also pointed ou that if the ventilation fan would fail, the longwall machinery would stop automatically.

In essential respects the testimony of Inspector Wehr is not disputed. It is clear that the existence of methane is unpredictable and that the cited mine was considered to be "gassy." The hazard of an explosion or fire and associated injuries under the circumstances, was therefore reasonably likely. The violation was accordingly, "significant and substantial" and serious. Mathies Coal Company, supra. I further find that the operator was negligent in failing t detect the violation.

Citation No. 2103078 alleges a violation of the standard at 30 C.F.R. § 75.200 and more particularily charges as follows:

> There were three 6 foot conventional [roof bolts] along the B track haulage road of Cherokee that were missing or dislodged. (1) Between 61-62 chute a[n] 8 foot by 8 foot area of unsupported roof that was loose and drummy, (2) At 47 chute an area of unsupported mine roof of 6 feet by 8-1/2 feet of mine roof that the roof was loose and drummy, (3) At 47 chute an area of 6 feet by 9-1/2 feet of unsupported mine roof that was solid when tested."

The cited standard provides in part that the roof and ribs of all active underground roadways, travelways and work ing places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. The Respondent again does not dispute that a violation occurred as charged but argues that the violation was not "significant and substantial."

separate and create a hazard roof fall. The [illegible] conditions were in the busy haulage area.

According to Wayne Croushore, mine foreman, it was unlikely that the roof would fall "right away." He observed that he and the inspector stood beneath the cited conditions to take measurements and that accordingly, he thought the condition was not unsafe. Croushore also pointed out that the preshift examination is performed while moving on a jeep and it is therefore difficult to see loose and/or missing roof bolts.

Within this framework, I conclude that the violation was "significant and substantial" Mathies, supra. I also find the operator to have been negligent in failing to detect the cited conditions. It is no defense that the conditions were difficult to observe while moving in a jeep. The proffered defense only points out the need for a more thorough preshift examination.

Citation No. 2104446 alleges a violation of the standard at 30 C.F.R. § 75.701-5 and charges as follows: "Separate clamps were not provided for the frame ground and the electrical return ground for the lights in the dinner hole of the 8 Flat 6 RN section 001. Both wires were on same clamp." The cited standard provides as follows: "The attachment of ground wires to a mine track or other grounded power conductor will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection."

The Respondent again does not dispute that a violation occurred as charged but argues that the violation was not "significant and substantial." According to Inspector Wehr, if the clamp separates from the rail, either from a derailment or vibration, there is a potential for shock, electrocution or burns to miners touching metal baskets in the dinner hole. According to electrical engineer Gary Stevenson, there would be no hazard if the wires attached to the clamp became separated. In his opinion, if there were a derailment, the wires would most likely separate or break. Stevenson did not, however, deny that there would be a shock hazard should the wires remain connected upon the separation

follows:

> The Joy continuous mining machine SNJM274 was not maintained in permissible condition in the 6 Flat 28 room section MNV002. One of the left headlights was not securely fastened to frame of the machine and the other headlight was provided with a locking device, but did not lock the screw type lens cover in place.

Respondent again does not dispute that a violation occurred as charged but alleges that the violation was not "significant and substantial." The hazard associated with the violation was described by Inspector Wehr as allowing the lens to loosen through vibration and allow methane into the light compartment. The methane could explode from an arc or spark inside the compartment and allow the flame path to escape. Clearly such an explosion could cause fatalities. Wehr also observed that high levels of methane have been liberated in the vicinity of the area cited and indeed the operator had previously been cited for an "imminent danger" having 1.5 percent levels of methane in the No. 28 room section. Wehr also observed that it is not unusual for arcing and sparking to occur within the light compartments because of vibration from the continuous mining machine. Wehr pointed out that although he charged two separate violations in the citation, he was asserting that only the loose lens was "significant and substantial" and that only it presented an explosion hazard.

The mine foreman did not dispute Wehr's assessment of the hazard and conceded that the continuous mining machine has "quite a bit of vibration while mining coal." According to electrical engineer Gary Stevenson, there "should be" no arcing or sparking in the headlights of the continuous miner because there is ordinarly a "firm and tight connection." Stevenson admitted, however, that if the lens cover did back off and there was arcing in the presence of methane at combustible levels, there would indeed be a hazard.

Within this framework of evidence, I conclude that the violation was indeed "significant and substantial" and a

powered tractor Serial No. 76158 at the 6 Flat 19 room section (ID013) was not being maintained in a permissible condition. Locks were not provided to prevent the plugs from coming loose from the battery box receptacles."

At hearing the parties agreed and stipulated that the facts surrounding this alleged violation were nearly identical to another violation presently before the undersigned judge in Docket No. PENN 83-166, Citation No. 2102678. The parties further agreed that the determination in that proceeding should be incorporated by reference and be determinative of the disposition of this citation. Since I have found that the violation charged in Citation No. 2102678 was "significant and substantial" and caused by the operator's negligence those findings are likewise incorporated herein by reference.

Docket No. PENN 83-157. At hearing, the Secretary requested to withdraw Citation No. 2104224 based on the discovery that a suitable lifting jack had indeed been provided for the No. 65 eight ton locomotive being operated at the 105B track and that accordingly, there was no violation of the standard at 30 C.F.R. § 75.1403. Based on the Secretary's representation, the undersigned approved of the withdrawal. Accordingly, Citation No. 2104224 is vacated.

The Secretary also moved at hearing for a settlement of Citation No. 2104225 and the operator agreed to pay the proposed civil penalty of $91 in full. Based on the representations and documentation presented at hearing, I find that the proposal for settlement is in accord with the provisions of section 110(i) of the Act, and, accordingly, I approve the settlement.

In determining the appropriate penalties to be assessed in the various cases before me, I am also considering the evidence that the operator abated all of the cited conditions in a timely manner and in good faith, that the operator is large in size, and that the operator had a fairly substantial history of violations, including violations of number of the standards cited herein.

ORDER

Citation No. 2013930	$ 250
Docket No. PENN 83-116	
Citation No. 2000148	vacated
Citation No. 2102668	250
Docket No. PENN 83-148	
Citation No. 2011291	100
Citation No. 2104283	206
Docket No. PENN 83-155	
Citation No. 2103162	126
Citation No. 2103073	400
Citation No. 2103078	400
Citation No. 2104446	126
Citation No. 2104449	400
Docket No. PENN 83-156	206
Docket No. PENN 83-157	
Citation No. 2104224	vacated
Citation No. 2104225	91
	$2,555

Gary Melick
Assistant Chief Administrative Law Judge

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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDIN
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-151
Petitioner	:	A.C. No. 36-00970-03520
v.	:	
	:	Docket No. PENN 83-166
U. S. STEEL MINING COMPANY,	:	A.C. No. 36-00970-03518
INC.,	:	
Respondent	:	Docket No. PENN 83-167
	:	A.C. No. 36-00970-03523
	:	
	:	Maple Creek No. 1 Mine

DECISION

Appearances: Thomas Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitione Louise Q. Symons, Esq., United States Ste Corporation, Pittsburgh, Pennsylvania, fo Respondent.

Before: Judge Melick

These cases are before me upon the petitions for ci penalty filed by the Secretary, pursuant to section 105(of the Federal Mine Safety and Health Act of 1977, 30 U. § 801 et seq., the "Act" for violations of regulatory st dards. The general issues before me are whether U.S. St Mining Company, Inc., (U.S. Steel), has violated the reg tions as alleged, and, if so, whether those violations a of such a nature as could significantly and substantiall contribute to the cause and effect of a mine safety or health hazard i.e. whether the violations are "significa and substantial." If violations are found, it will also necessary to determine the appropriate penalty to be assessed.

DOCKET NO. PENN 83-151. As amended at hearing, Citation No. 2102679 charges a violation of the standard at 30 C. § 75.1714-2(c) and specifically alleges as follows: "Ga Gamon shuttle car operator was observed on the seven fla eight room section ID014 without the 1 hour filter type

harged, but argues that the violation was not "signifi- and substantial." In order to establish that a viola- of a mandatory safety standard is "significant and tantial," the Secretary must prove: (1) the underlying ation of a mandatory safety standard; (2) a discrete ty hazard--that is, a measure of danger to safety-- ributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and a reasonable likelihood that the injury in question will f a reasonably serious nature. Secretary v. Mathies Company, 6 FMSHRC 1 (1984).

Inspector Okey Wolfe of the Federal Mine Safety and th Administration (MSHA) testified that during the se of his inspection of the Maple Creek No. 1 Mine on ary 24, 1983, he observed the shuttle car operator, Gary , 140 feet from his shuttle car without his one-hour- er-type-self-rescue device. Gamon had left it on the le car. It is not disputed that under the cited stan- the self-rescue device could properly have been removed the miner's belt and placed on the shuttle car (because s potential for bruising the miner while working the le car) so long as the device remained within 25 feet e miner. The violation was "significant and substan- according to Wolfe, because of the hazard to the miner ffocation from carbon dioxide resulting from fire and . He thought it reasonably likely that a fire could anywhere outby the cited section from sources such as pumps or trolley wires and noted that protective res must be taken quickly in the presence of carbon de.

Joseph Ritz, ventilation foreman, accompanied Wolfe g this inspection. Ritz thought it "highly unlikely" ire or smoke to occur at the mine. According to Ritz, huttle car operator left his machine to assist with brattice and could be expected to have been away from quipment for only 10 minutes. Ritz opined, moreover, it would have taken the operator only 10 to 15 seconds turn to his shuttle car for his self-rescue device and would have been as fast as retrieving it from his belt.

Even assuming, however, that the miner could have

that the violation was "significant and substantial."

According to Inspector Wolfe, Respondent had never previously been cited for a violation of the cited standard and in his opinion, the individual miner had forgotten to take his self-rescuer with him. Wolfe's determination of relatively low negligence is accordingly appropriate.

CITATION NO. 2103095. The operator does not dispute that the cited violation did in fact occur. The parties agreed and stipulated at hearing that the same hazard existed concerning this citation as existed with respect to Citation No. 2102678 in Docket No. PENN 83-166. Since I have found infra that the latter violation was indeed "significant and substantial" the violation herein is also "significant and substantial" and constituted a serious hazard. Relying upon the negligence findings relating to Citation No. 2102678 I find correspondingly that the operator was also negligent herein.

DOCKET NO. PENN 83-166

CITATION NO. 2012691. At hearing, the Secretary requested to withdraw and vacate this citation because the inspector who cited the conditions had died and alternative evidence was deemed insufficient to support the citation. Under the circumstances, the request was granted and the citation is accordingly vacated.

CITATION NO. 2102678. The operator does not dispute the existence of the violation cited herein, and challenges only the "significant and substantial" findings associated therewith. The citation charges a violation of the standard at 30 C.F.R. § 75.503 and more particularly alleges as follows: "The Kersey battery powered tractor, serial No. 76-153, approval No. 26-2213-11 was not being maintained in a permissible condition at the seven flat eight room section ID014. The plugs to the battery tray were not locked to prevent the plugs from coming loose."

The cited standard requires that the "operator of each coal mine shall maintain in permissible condition all electric face equipment required by sections 75.500, 75.501

course of his inspection of the No. 1 Mine, on January 24, 1983, he observed the cited battery-powered tractor without the padlock specified in the cited regulation. Wolfe observed that if the threaded plugs powering the tractor had become unthreaded, the 250 volt cable could pull out of the machine thereby creating an arc. He noted that the No. 1 Mine was subject to section 103(i), spot inspections under the Act because of its high liberation of methane. Wolfe accordingly opined that there was a reasonable likelihood for such an arc to result in a methane explosion.

The operator's witness Don Basile, conceded that if the plug connection should become loose while the equipment was operating under load, then an arc could indeed occur. He thought, however, that since the arc would have to travel 6 or 7 inches before entering the outside atmosphere, the chances of an explosion were remote. Basile further stated that he had never seen a sleeve or collar loosen sufficiently to permit the plug to become disconnected.

Particularly in light of the gassy classification of the Maple Creek No. 1 Mine, I find that the arcing hazard presented by the unsecured plug was quite serious and constituted a "significant and substantial" violation. I find that I must also agree with Inspector Wolfe's assessment of negligence in this case, inasmuch as it was obvious in this case that the padlocks had not been secured in an appropriate manner and that this was a frequent type of violation at this mine.

DOCKET NO. PENN 83-167

CITATION NO. 2104362. This citation alleged a violation of a safeguard notice issued pursuant to 30 C.F.R. § 75.1403 on July 31, 1973. It charges that "the No. 31 eight ton locomotive being operated by Bill Wiles on the eight flat 56 room track was not provided with a suitable lifting jack." The specific safeguard notice dated July 31, 1973, (Government Exhibit No. 2) stated in part that a 13-ton locomotive was not equipped with a suitable lifting jack and bar in the eight flat section and that all locomotives in the mine shall be equipped with suitable lifting jacks and bars. It

and up to 12 tons loaded. He observed that in the event of a derailment and the absence of an available jack and bar, a person pinned beneath a car or the locomotive could not readily be rescued. Wehr observed that although a "rerailer" was available on the locomotive, it is necessary to move the cars and locomotive for it to operate. With a jack and bar, it is not necessary that the locomotive or cars be moved horizontally--an important distinction. The jack in this case was located about 1,000 feet from the locomotive. Wehr opined that even if the location of the jack were known, it would have taken at least 10 minutes to have retrieved it.

According to transportation foreman, Ira Seaton, the miner assigned to the locomotive told him that the jack was only five blocks away (estimated at 425 feet). The miner said he had used the jack at that location and intended to retrieve it after loading coal.

Particularly in light of the frequent derailments at the No. 1 Mine, and the grave dangers posed by the heavy equipment used on the track, I find the cited violation to be "significant and substantial." Particularly in light of the history of derailments and other similar violations at this mine, I find that the operator was negligent in failing to enforce its policy of requiring jacks and bars on the locomotives.

CITATION NO. 2011298. This citation alleges a violation of the standard at 30 C.F.R § 75.503 and specifically charges as follows: "The Fletcher roof bolting machine operating in nine flat left straight was not maintained in permissible condition in that the hose conduit and the outer jacket for the fluorscent lights was damaged, exposing the insulated power wire securing electrical power to the lights." It is not disputed that to meet the "permissibility" requirements of the cited standard the operator must maintain the cited equipment in compliance with the standards set forth in 30 C.F.R. Part 18.

In this case the cited roof bolter had been the subject of an MSHA approved field modification under 30 C.F.R. § 18.81. (Operator's Exh. No. 1). These modifications must

No. 1, p. 5) for the power cable between the junction box and the light here cited. According to the undisputed evidence, however, the hose conduit for that power cable had been damaged thereby exposing the insulated power wire inside. Since the required hose conduit was not being maintained in a "permissible" condition a violation of 30 C.F.R. § 503 therefore existed.

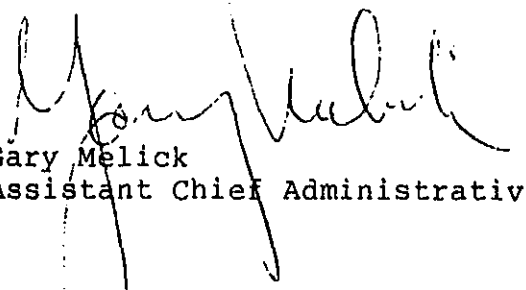
I must agree, however, with the Secretary's position at hearing, that the violation was not "significant and substantial." It is undisputed that the entire illumination system on the roof bolter was deemed "intrinsically safe" by MSHA. Accordingly, even should the cable become severed, there was no capability of a methane ignition. The violation is accordingly also of low gravity. I find that the operator was, however, negligent in failing to detect the violation in light of the undisputed evidence that the condition had existed for at least a week.

In determining the appropriate penalties to be assessed in this case, I am also considering evidence that the operator abated all of the cited violations in a timely manner, that the operator is large in size, and that the operator had a fairly substantial history of violations, including violations of several of the standards cited.

ORDER

Citation No. 2012691 is vacated. The U. S. Steel Mining Company, Inc., is ordered to pay the following civil penalties within 30 days of the date of this decision:

DOCKET NO. PENN 83-151	
Citation No. 2102679	$ 200
Citation No. 2103095	220
DOCKET NO. PENN 83-166	
Citation No. 2102678	220



Gary Melick
Assistant Chief Administrative Law Judge

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